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IRISH LAW REPORTS,

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QUEEN'S BENCH, COMMON PLEAS,

AND

EXCHEQUER OF PLEAS,

DURING THE YEARS 1841 AND 1842.

Queen's Bench:

By FRANCIS BRADY, Esq. and JOHN S. ARMSTRONG, Esq.

Common Pleas:

By DOMINICK M'CAUSLAND, Esq.

Exchequer of Pleas:

By THOMAS JONES, Esq. and ROSS S. MOORE, Esq.

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JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

COURT OF QUEEN'S BENCH.

Lord Chief Justice.—The Right Hon. EDWARD PENNEFATHER.

Second Justice.—The Honorable CHARLES BURTON.

Third Justice.—The Honorable PHILIP CECIL CRAMPTON.

Fourth Justice.—The Right Honorable LOUIS PERRIN.

COURT OF COMMON PLEAS.

Lord Chief Justice.—The Right Honorable JOHN DOHERTY.

Second Justice.—The Honorable ROBERT TORRENS.

Third Justice.—The Right Honorable NICHOLAS BALL.

Fourth Justice.—The Honorable JOHN LESLIE FOSTER.

COURT OF EXCHEQUER.

Lord Chief Baron.—The Right Honorable MAZIERE BRADY.

Second Baron.—The Honorable RICHARD PENNEFATHER.

Third Baron.—The Right Honorable JOHN RICHARDS.

Fourth Baron.—The Right Honorable THOMAS LEFROY.

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The Right Honorable FRANCIS BLACKBURNE.

SOLICITOR GENERAL.

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First Serjeant.—RICHARD WILSON GREENE, Esq.

Second Serjeant.—JOSEPH STOCK, Esq., LL.D.

Third Serjeant.—RICHARD BENSON WARREN, Esq.

CORRIGENDUM.

Page 312, last line but one from bottom, *for* 'plaintiff,' read 'defendant.'

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CASES

IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

AND

Exchequer of Pleas.

OLDHAM and another *v.* SHAW and another.
(*Common Pleas.*)

1841.
Common Pleas.
Michaelmas
Term.
Nov. 4.

MR. WILLIAM MOCKLER moved, that service of the writ of *ca. ad resp.* on one of the defendants in this case be deemed good service of the same on the other. It appeared by affidavit, that the defendants were partners in trade, but that one only of them, who was duly served, resided in this country, and conducted the business of the firm in Dublin, while the other, for whom it was sought to substitute service, resided constantly out of the jurisdiction, conducting another house of business of the same firm in Liverpool. It was also sworn, that the demand was a partnership demand against the defendants, and that the partnership still continued.

This Court will not substitute service of process upon a partner out of the jurisdiction by serving a partner within it, although the demand was sworn to be a partnership demand, and that the partnership still continued.

TORRENS, J.—It is not the practice of this Court to grant such an application. The mode of proceeding here is by the process of outlawry against the absent defendant.

Mr. *Mockler*.—The Court of Exchequer have substituted service under the same circumstances; *Flaherty v. Grierson* (a): but I am aware that this Court, in the case of *Fairlie v. Quin* (b), refused a similar application to this, on the ground that there was no process of outlawry in the Exchequer, which accounted for the practice of that Court in granting it. In the more recent case, however, of *M'Kenny v. Mark and another* (c), the Queen's Bench, where process of outlawry exists, granted

(a) 2 Law Rec., N. S., 124.

(b) 1 Smythe, 189.

(c) 2 Ir. L. Rep. 161.

M. T. 1841.
Common Pleas.

OLDHAM

v.

SHAW.

the same application.—[TORRENS, J. The report of that case is too meagre to induce us to alter the practice.]—The Court has already altered its practice with regard to the substitution of service on agents of English companies; *Chamberlayne v. County Fire Office Company (a)*, and *Maceldony v. The Office of Standard of England Insurance Company (b)*; and in *Fairlie v. Quin*, the Chief Justice intimated that it would be desirable to alter the practice as to the substitution of service on partners, were any authority cited to warrant it.

DOHERTY, C. J.

For my own part, I am still of opinion that it would be desirable to amend the practice of this Court in this respect, and that there should be an uniformity of decision of all the Courts on points of this nature :* but the majority of my brethren consider it so settled that it would be inexpedient now to vary it; and whatever may be my individual opinion on the subject, I feel myself bound to acquiesce with the other members of the Court.

TORRENS, J.¹

The case in the Queen's Bench was decided by a single Judge, and not by the full Court, and is not, therefore, of sufficient authority to induce us to alter our practice, even if we thought ourselves at liberty to do so.

BALL, J.

The granting of this motion would be a departure from the rule of the Court. If the practice be bad, we can alter it by a general rule of our own; but it is too much to ask us to alter it on a motion, even although supported by an authority from another Court.

No rule.

(a) 2 Law Rec., N. S. 71.

(b) 1 Smythe, 52.

* Mr. Justice Johnson having retired from the Bench at the close of the long Vacation, and the arrangement for his successor not having been completed, only three Judges sat in Court during this Term.

M. T. 1841.
Common Pleas.

FRANCIS v. GORE.

Nov. 6.

MR. HENRY O'HARA made an application, that the service of the writ had in this case be deemed good service. The writ, it was sworn, was handed to the governess of the defendant's family, at his house, and she was desired by the process-server to give it to the defendant. It was also sworn by the same person that he had seen her talking in the room with a person whom he believed to be the defendant, shortly after the service; and that he believed that the defendant had got a copy of the writ.

The Court will not deem a service of the writ sufficient, unless it is made to appear that the writ reached the hands of the defendant.

Per Curiam.

It is not certain that the process ever reached the hands of the defendant; and this Court will not deem any service good service unless that fact is made to appear. However, under the circumstances, we will allow you to substitute service by serving the house of the defendant with a copy of the writ and of this order.

DANCER in replevin v. KELLY.

Nov. 6.

MR. HAMILTON SMYTHE applied for a rule directing the Officer to take the engrossment of the first avowry off the file, and to file a new engrossment. Three avowries had been put in, and a demurrer having been taken to the first, leave was given to amend; but it was found necessary to file a new engrossment, as it was impracticable to amend the present one on the file. The two others were short avowries, and it would not be necessary to interfere with them. The application was rendered necessary by the refusal of the Officer to allow the engrossment to be taken off the file without the leave of the Court.

Where one of several avowries cannot be amended on the file, it will be necessary to apply to the Court for liberty to file a new engrossment, and they will require a new engrossment of all the avowries to be filed.

Per Curiam.

The Officer was right in his refusal. But, as all the avowries are on the one engrossment, you must take all of them off the file, and file a new engrossment of them, serving the rules to plead anew.

M. T. 1841.
Common Pleas.

Nov. 8.

Assignee ROBINSON v. Heir and Terretenants of JULIAN.

This Court will not grant time to plead, unless notice of the motion shall have been served on the opposite party, and notice served the day before will not be deemed sufficient.

MR. WALL applied for time to plead to the *scire facias*.—The regular time expired on this day, and notice of this motion had been served the evening before. The application was not sooner made, as it had been discovered only yesterday that the heir was a minor, and that it would, therefore, be necessary to petition the Court to appoint a guardian. No affidavit was made.

DOHERTY, C. J.

The notice you have served is a nullity, and the Court never grant a motion of this description without a regular notice served on the opposite party.* You may, however, serve a notice with leave of the Court, that the plaintiff may come in and offer any terms he may think expedient and beneficial to himself, and which may not, at the same time, be of detriment to you.

* The proper application to be made under circumstances similar to the foregoing, is for liberty to serve a notice of motion on the opposite party.—Vide *Dancer v. Kelly*, 3 Ir. Law Rep. 32.

Nov. 8.

Executors of BRUCE v. POE.

Conditional order granted to shew cause why service of a *scire facias* (the return of which was out at the time of application) on the law agent of the conusor residing out of the jurisdiction, should not be deemed good service—it having been sworn,

that he was, and had been for some years, the law agent of the conusor.

The Court will not make the said conditional order absolute, without notice of the motion served on the law agent.

Semble.—The Court will not in general deem service already had good service—the same not being the act of the Court; but will give an order to substitute service.

MR. BOYLE KELLER moved that service of the *scire facias* had in this case, be deemed good service of the conusor, who resided out of the jurisdiction. The *scire facias* had been served on the law agent of the conusor, who had stated, on application, that his principal was at Bath when he had last heard from him, but had since then gone to the Continent. A similar service and application had been made to the land agent, who stated that all papers left with him were forwarded to the law agent, and that his employer was in Germany.—[DOHERTY, C. J. We cannot take notice of the service already had, as it was not the act of the Court, but we can give an order to substitute service on the law agent.]—That order

M. T. 1841.
Common Pleas.
BRUCE
v.
POE.

would be most inconvenient to us, inasmuch as the return of the *scire facias* being out, it will be necessary to renew it, in order to serve, with regularity, a copy of it.—[*Per Curiam*. What is the swearing as to the party served being the law agent of the defendant?—It is sworn, that “he is, and has been for some years, the law agent.”

DOHERTY, C. J.

We think that what you have stated will be sufficient, and you may take a conditional order that the service had be deemed good service, serving this order on the law agent.

Mr. *Keller* came in a few days afterwards to make the conditional order absolute, on an affidavit of the service as directed, and a certificate of no cause.

The COURT inquired if notice of the motion had been served, and having been answered in the negative, desired that regular notice should be served on the law agent, as it would affect the rights of third parties.

HUGHES v. GLENNY.

Nov. 9.

MR. HOLMES, on behalf of the defendant, moved for a rule to enter up judgment as in case of a nonsuit, the cause having been at issue more than three Terms. The action had been brought by the Agricultural and Commercial Bank in the name of their Public Officer, for money alleged to have been borrowed from them by the defendant.

Where a bill had been filed against a Banking Company, and a receiver appointed over all their property, with a reference to the Master to report on the suits to be prosecuted or defended by them—the Court would not allow judgment as in case of a nonsuit to be entered up against them in a cause which had been at issue more than three

Mr. *Hatchell*, Q. C., *contra*.—The reason of our not having proceeded sooner, is sworn by the Public Officer to have been the loss of the receipt given by the defendant for the money lent to him by the Bank; and that is analogous to the absence of a material witness, which has been always admitted to be a valid excuse for not having proceeded to trial—*Tidd. P.* 826 (8th ed.) If they will now admit the receipt of the money, we offer to go to trial next Sittings. But we have another and a better reason for the delay that has occurred, in the circumstance of a bill having been filed in Chancery against the Company, and on the

Terms, they undertaking to go to trial on the first *Nisi Prius* day in the next Term.

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coming in of the answer, a receiver was appointed over all the property of the Bank, and it was referred to the Master to report on the suits that should be prosecuted or defended, which precluded us from proceeding until the Master's report, which has only now been prepared, but not confirmed. The party through whose hands the money was paid to the defendant has left the country, so that we cannot have the benefit of his evidence.

Mr. *Holmes* observed, that this action was not included in the Master's report as one of those to be prosecuted.

DOHERTY, C. J.

Under the special circumstances of the case, we shall say no rule on this motion—the plaintiff undertaking to go to trial on the first *Nisi Prius* day in next Hilary Term ; and let the costs be costs in the cause.

REGAN in replevin v. FRANCIS.

Nov. 11.

Where the defendant had not, pursuant to several notices, the last of which bore date the 27th of October, signed a consent to make a rule of *Nisi Prius* of the 18th of June a rule of Court, until the 29th of October, and after expenses incurred by the plaintiff in preparing for a motion to have it entered up with costs, of which notice had been served on the same 29th, and an offer on his part to withdraw it on the payment of the actual expenses incurred, the Court ordered the said rule of *Nisi Prius* to be made a rule of Court with costs against the defendant, notwithstanding the conditional order had been obtained within the first four days of Term.

MR. C. HAROLD WALKER, for the plaintiff, moved to make absolute a conditional rule obtained on the first day of Term, that an order made at *Nisi Prius* in this cause, on the 18th of June last, should be made a rule of Court, and that the defendant should pay the costs of the motion, under the following circumstances. Part of the order was, that the defendant should execute an indemnity bond. On the 1st of July the plaintiff served on the defendant's attorney the necessary notice to consent to have the said order made a rule of Court. To this no answer was returned. On the 10th of July the draft of the bond was sent to the same party, and not returned until the 28th of October. And on the 13th of July another notice was served on the defendant herself, apprising her of the notices served on her attorney: It was sworn, on the part of the defendant, that the bond was submitted to Counsel, who took it with him on Circuit. On the 27th of October, another consent to have the said order made a rule of Court, was served on the defendant's attorney, with the following notice:—"Sir, inasmuch as you have not complied with the order of "this Court, or the notices which have been served ; and in order to "save expense, I herewith send you a consent, and require you to sign "and return it to-morrow before twelve o'clock ; and if you refuse, I "shall proceed to file the necessary affidavits to have the order of *Nisi*

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“*Prius* made a rule of Court.” No answer was returned to this on the 28th of October; but on that day, as stated above, the draft bond approved of, but not the consent, was returned to the plaintiff’s attorney. On the 29th, affidavits were prepared to ground the motion and filed, and notice of motion served, but briefs were not sent out to Counsel; and on the same day the consent was signed by the defendant, and left at the office of the plaintiff’s attorney. On the 30th, notice was served offering to withdraw the notice on the defendant paying the costs of the affidavits filed, and stating that if the requisition were complied with, briefs should not be sent to Counsel. The case of *Reynolds v. Kelly* (a), was relied on as entitling the plaintiff to the costs of the motion.

Mr. J. D. Fitzgerald shewed cause.—The delay that had occurred between the 1st of July and 1st of November, had nothing to say to the question. That was only a delay in the execution of the bond; and this motion is not to compel a return of the bond, or to carry the *Nisi Prius* order into effect, but merely to make the consent a rule of Court—so that no injury could arise to the plaintiff; for the order at *Nisi Prius* was the same as the *postea*, and four days of Term would have been allowed before any thing could have been done on that.

DOHERTY, C. J.

It is not possible to struggle against the broad features of this case, viz., the delay that has occurred on the part of the defendant for three months. It is obvious, that the object of the plaintiff’s attorney was not to incur unnecessary expenses. It is true, there was no application made by him for the bond from the 10th of July until the 28th of October; but that is not the delay complained of, and for which the costs are required—but for not signing the notice of the 27th of October; for if that consent had been signed in due time, the notice of this motion would not have become necessary. We must, therefore,

Disallow the cause shewn, and make the conditional order absolute, with costs.

(a) 3 Ir. Law Rep. 186.

M. T. 1841.
Common Pleas.

POWER and PRENDERGAST v. O'BRIEN.

Nov. 11.

The Sheriffs levied an execution in the month of July last, when they received notice from a third party, a creditor of the defendant, not to pay over the amount of the execution levied, on an allegation that the defendant had committed an act of Bankruptcy, and that it was intended to have a Commission issued, but no further steps were taken in that respect.—On the Sheriffs moving, that the time for the return of the *fi. fa.* be extended, offering to lodge the amount levied in Court, the Court refused the motion, but without costs, as it did not appear that there was any collusion between the Sheriffs and the creditor.

MR. ARMSTRONG, Q. C., moved, on the part of the Sheriffs of Dublin, that the time for the return of the *fi. fa.* be extended, offering to lodge the amount of the execution levied in Court. The execution, it appeared, had been levied on the 8th of July last, and on the following day a notice not to pay over the amount to the plaintiffs, was served on the Sheriffs by one Woodroffe, a creditor of the defendant, who alleged that the defendant had committed acts of bankruptcy, and that it was his (Woodroffe's) intention to have a commission issued. No further proceedings had, however, been taken in the matter. There had also been a notice served on the Sheriffs by Prendergast, one of the plaintiffs, warning them not to pay over the money to the other unless on a joint receipt.

Mr. Hatchell, Q. C., for the plaintiff Power.—The Sheriff has a right to come into Court to require their protection; but to entitle him to it, he must make a fair and reasonable case, and the Court will not interfere on a mere surmise or conjecture that the defendant has committed an act of bankruptcy. There was no third party in the case until after the execution was levied, and Woodroffe then serving a cautionary notice, and taking no further proceeding for the four last months, the Court will not suspend the payment of his money to the plaintiff. As for the other notice served by one of the plaintiffs, the Sheriff has nothing to fear in respect of it; for he has it in his own power, and it is for his own security, to take care that he gets a joint receipt before he pays over the money.

The Court ordered the motion to stand over until notice had been served on Woodroffe, stating it to be by the order of the Court; because if it should appear that there was any collusion between Woodroffe and the Sheriffs, the latter would be ordered to pay the costs arising from having withheld the money levied.

Nov. 13.

Mr. Hatchell, Q. C. again applied to have the money paid over to his client, on the affidavit of service of notice on Woodroffe.

Per Curiam.

We do not sanction the Sheriffs in withholding the amount of the execution in their hands; but we will not interfere; and, therefore, refuse this motion. As to the costs,—if Woodroffe had come in on this motion,

under the circumstances, he should have paid them ; but as it does not appear that there has been any collusion between him and the Sheriffs, and as the latter have come in honestly to take the opinion of the Court, we must say, no costs of the motion.

Let the motion be refused without costs.

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DOYLE in replevin v. KELLY.

Nov 11.

A MARE had been stolen from the plaintiff on the 21st of May ultimo. The defendant Kelly had purchased a mare for very near, if not its full, value, in the first week in June, from a person of the name of Butler, who swore that he had purchased the same in the fair of Redhills from an unknown party, on the 24th of May. Butler had been arrested by the plaintiff on the 17th of August ; informations were sworn against him, and he was tried for the felony at the October Sessions, and acquitted of the charge. A replevin, issued on the 27th of August, returnable into this Court on the 5th of November, was served on the defendant on the 2nd of September, when the mare was taken from him. Though Butler had been acquitted, from the affidavits which had been filed on the part of the plaintiff, there was strong ground for presuming, that the mare in question was the same which had been stolen from the plaintiff, and that he (Butler) had stolen it.

When the plaintiff, from whom a mare had been stolen which was found in the possession of the defendant, who had purchased her from a party accused of having stolen her, had issued a writ of replevin returnable into this Court, and thereby obtained possession of the said mare, after informations had been sworn against the reputed felon, but before he had been tried.—The Court ordered the writ to be quashed, and the mare to be returned to the defendant.

Mr. Darley now moved, that the writ of replevin which had been returned into this Court might be quashed, and the property returned to the defendant. The replevin ought never to have been issued in this case, the question being a claim of property, and that claim asserted ; *Shannon v. Shannon (a)* ; *Comerford v. Blake (b)*. The party, to maintain such an action, must have either the general or the special property in the goods at the time of the taking ; *Longfield on Replevin*, 133 ; *Co. Lit.* 145, b ; and if the defendant claims the property in the goods, the Sheriff's power to replevy is at an end. In *Shannon v. Shannon*, Lord Redesdale observed that the use of the writ of replevin in cases like the present is a crying grievance. The first evidence of property is possession, and that is, by the proceeding, taken from the defendant in the first instance, and then the onus of proving title is thrown upon him, on whom, as having the *prima facie* title, possession, it ought not to be thrown. The possession was in this case in the defendant Kelly, the property, if ever it was in the plaintiff, having been changed by the sale in market overt, and therefore, that possession ought never to have been changed, until a better title

(a) 1 Sch. & Lef. 324.

(b) 2 Ir. Eq. Rep. 178.

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should have been proved; *Comerford v. Blake*. If this replevin was issued properly, any person in the community may enter his neighbour's house, and take away the furniture, and put the owner into the position of proving his property against the possession. But, even if the property had been stolen, trover, it has been ruled, cannot be maintained, until after the prosecution and conviction of the thief, on the principle that justice might be defeated and felonies healed; *Horwood v. Smith* (a); *Peere v. Humphrey* (b); *Gimson v. Woodfull* (c). And when trover will not lie, neither will replevin—there being no difference between the actions in principle; *Reeves v. Morris* (d); because in trover damages are sought, whereas in replevin the property in specie is demanded; *Hammond N. P.* 403; and where no damages could be recovered in trover, surely there ought not to be any restitution of the property. The writ in this case issued before the prosecution of the offender, though after the informations had been sworn; but the action cannot be commenced, and therefore the writ ought not to be issued, before the conviction. We cannot look to what may have happened after the writ issued, but the case must be decided as if we had applied to quash the writ at the time it was issued, and the subsequent attempt to convict cannot be taken into consideration. Suppose this writ is not quashed, we cannot plead *non cepit*; for then the defendant could not have a return of the mare; 1 *Saund.* 367, n. I.; and therefore the only plea we could plead would be that of property, and in that case we are under the unjust necessity of proving our title; for it would be out of the question to attempt to spread upon the record the fact of the claimant of stolen goods not having prosecuted the thief to conviction.

Mr. Macdonagh for the plaintiff.—All the circumstances of this case shew that there is a disputed fact to be tried, and, in such an event, the Court will never quash the writ. The actual taking, or not taking, is not the principle on which the writ has been issued, or been quashed; for neither in *Shannon v. Shannon*, nor in *Comerford v. Blake* was there any taking; and yet in the former the writ was quashed, and, in the latter, which is an authority for us, it was allowed to issue. All the affidavits have proved to a moral certainty, that Butler was the thief, and it was admitted that he sold the horse to the defendant Kelly; and as we could not re-take our own property by force, we were driven to sue out a replevin, at which time there were two questions to be tried, viz., identity, and property—and those are and ought to be tried in this action. The Court of Queen's Bench, in the case of *Corscuden v. Stewart* (e), refused a

(a) 2 T. R. 750.

(b) 2 Ad. & El. 499.

(c) 2 C. & P. 43.

(d) 2 Ir. Law Rep. 316.

(e) 1 Ir. Law Rep. 106.

motion similar to the present, on the grounds of there being questions of law, and questions of fact, to be tried. The same principle was likewise affirmed in *Farrell v Beresford* (a); and there it was explained that Lord Redesdale did not mean to limit the writ of replevin, but the abuse of it. If the proposition contended for, viz., that the owner was to wait for a conviction or acquittal, the property might in the mean time be lost; but the true principle, by which the Courts are guided on the subject, is to secure public justice; and that will be satisfied by the *bond fide*, and concurrent prosecution which was had in this case. It cannot be required that the party should await the conviction or acquittal of the felon; for no principle of law is better established than that civil rights cannot be affected by any thing that takes place in a Criminal Court. *Gimson v. Woodfull* is altogether distinguishable from this case; for in it there had been no legal prosecution at all even commenced. Nor are any of the other English authorities, which have been relied on, at all events, conclusive against us; for it is usual to grant replevins in this country in cases in which they would not be allowed to issue in England; *Ex parte Mansfield* (b). Moreover, there are numerous authorities which go to oust this Court of jurisdiction to quash the writ, even though returned into it.—[DOHERTY C. J. There can be no doubt of our jurisdiction; the only question that could arise might be as to the time of its commencement.]—Even where a party comes to property lawfully, as in this case, a replevin will lie if the real owner is desirous of recovering the specific chattel, as appears from the late case of *Reeves v. Morris* (c), which was decided on the principle, that if an artisan pawns property which has been entrusted to him professionally, replevin will lie on the part of the owner to recover it. Our object is to recover the specific and identical mare which we have lost, and not damages, and therefore replevin, and not trover, is the proper and most convenient form of action; *Dore v. Wilkinson* (d); *Galloway v. Bird* (e). The property was *in dubio*, as Lord Denman observed in *Peere v. Humphrey*, between the sale in market overt and the period of conviction; the defendant, therefore, having no more right to the property than the plaintiff, has no right to complain that he was deprived of any evidence of it by reason of the possession having been taken from him. We had, moreover, a right to take them peaceably as we have done; for when goods have been wrongfully taken from the possession of another, the owner may justify the re-taking of them wherever he finds them: *Chapman v. Thimblethorp* (f); *Wilkinson v. King* (g).

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Mr. Darley, in reply.—Where there is a question of property,

(a) 1 B. & B. 328.

(c) 3 Ir. Eq. Rep. 484.

(e) 12 Moore, 547.

(g) 2 Camp. 335.

(b) 1 Mol. 279.

(d) 2 Stark. 287.

(f) Cro. Eliz. 329.

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replevin is not the remedy to try the question; as laid down in the note to *Comerford v. Blake*, where *Leonard v. Stacey* (a), and *Co. Lit.* 145-6, are cited for the position. In *Corscaden v. Stewart*, the writ was not quashed, on the same principle as in *Farrell v. Beresford*, viz., because the general question of a right to stop goods *in transitu* could not otherwise be tried. A concurrent prosecution is not sufficient; but it is absolutely necessary that there should have been a previous conviction or acquittal, before the civil action will lie: *Dawkes v. Coveleigh* (b); *Crosby v. Lane* (c); *Marsh v. Keating* (d). Those are cases in which the defendant was the party who had been convicted of the felony, whereas this action, being against an innocent party purchasing from another, who has been acquitted of the charge, is an *a fortiori* case.

Cur. adv. vult.

DOHERTY, C. J.

Nov. 25.

After diligent inquiry and search, we have not been able to discover any precedent for a writ of replevin having been used in any instance analogous to the present; and we cannot but think that it would be a great evil if a party were admitted to sue out such a writ under such circumstances. A man's mare is stolen in the month of May, and never seen afterwards, until, in the following August, it is found in the possession of a person who alleges that he had purchased it; and it is not pretended that he did not come by it fairly and honestly. Possession is the first and principal badge of property, and he ought not to have been deprived of it, at all events, until the alleged felon had been prosecuted. On this subject the law has been very clearly and explicitly laid down by Best, C. J., in the case of *Gimson v. Woodfull*, which was cited in the course of the argument. He says:—"If I were to hold that this action could be maintained under such circumstances, we should have no more criminal prosecutions. I take it, the law is this—you must do your duty to the public, before you seek a benefit to yourself; and then there is no necessity for a civil action. The decisions go not only to the case of an action against the felon; but to actions against persons deriving their title under him. There is a case in the *Term Reports*, which says—that the property is in doubt until after the prosecution." If it were necessary to pursue the subject further, I might remark, that the English Act, 2 & 3 P. & M., c. 7, s. 5, gives an action of replevin or detinue to the owner of a horse unlawfully taken away, in the event of all the particulars required by that statute to constitute a regular sale in market overt not having been complied with; whereas, in the corresponding Irish enactment, 4 Anne, c. 11, there is no analogous section. On the whole, the plaintiff has taken a course that has never been known

(a) 6 Mod. 69.

(c) 12 East, 413.

(b) Styles, 346.

(d) 1 Bing. N. C. 217.

to have been adopted for the recovery of stolen property—and one for which, therefore, he has neither precedent nor authority—and accordingly, we must, in compliance with the terms of the motion, quash the writ, and order the property to be returned.

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TORRENS, J.

I was not present at the argument in this case ; but I feel no hesitation in concurring with the judgment of the Court. Before the time of Lord Redesdale, the writ of replevin was much abused in this country ; but since that period, it has been much more defined. Nevertheless, even in the times of its greatest abuse, neither in this country or in England, has there been an instance of a writ of replevin having been permitted to issue, where the property in dispute has been feloniously stolen ; and to permit it in the case now before the Court, would be a most dangerous precedent. Without much hesitation, therefore, I concur in the judgment that the writ be quashed.

BALL, J.

I concur in the judgment of the Court ; and, in addition to the reasons which have been given, I rest my opinion on the judgment of Sir Anthony Harte, in an *Anonymous* case reported in 1 *Molloy*, p. 390, which, in my mind, goes very strongly to confirm the view of the Court, that, in cases where there has been a felonious taking, replevin will not lie.

Let the writ of replevin which has been returned into this Court be quashed, and let the property be returned, with costs, to the defendant.

YOUNG v. ROBINSON.

Nov. 13.

MR. ROLLESTON applied for liberty to lodge in Court the sum of £5, in satisfaction of the action, according to the provisions of the late act,*

Money may be lodged in Court in satisfaction of case of trespass for an illegal distress.

* 3 & 4 Vict., c. 105, s. 46. " And be it enacted, that it shall be lawful for the " defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or " debauching of the plaintiff's daughter or servant), by leave of any of the said superior " Courts where such action is pending, or a Judge of any of the said superior Courts, " to pay into Court a sum of money by way of compensation or amends, in such manner, and under such regulations as to the payment of costs, and the form of pleading, " as the said Judges, or such eight or more of them as aforesaid, shall, by any rules or " orders by them to be from time to time made, order and direct."

M. T. 1841. 3 & 4 Vic. c. 105, s. 46. The action was trespass for an illegal distress, and not included among the exceptions of the foregoing enactment.

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DOHERTY, C. J.

Take the order; and let the money be lodged, under the late General Rule of Michaelmas Term 1841.†

† The following is the rule to which his Lordship alluded, and which was made in pursuance of the provisions of the foregoing enactment:—

“GENERAL RULE—MICHAELMAS TERM 1841.

“It is ordered, that the General Rules of Hilary Term 1832, and of the 1st of May 1834, so far as the same relate respectively to the payment of money into Court, and to the matters thereupon by the plaintiff or defendant in the action or actions in which such payment may be made, shall, until further order, extend and apply to the payment into Court of any money by way of compensation or amends under the powers given by the 46th section of an act passed in the third and fourth years of the reign of her present Majesty, entitled ‘*An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for the further amendment of the law, and the better advancement of justice in Ireland.*’ And that the payment of such money by way of compensation or amends, shall accordingly be made in such manner, and under such regulations, as to the payment of costs and the form of pleadings, as prescribed by the aforesaid General Rules in respect of payment of money into Court.

“11th of November 1841.”

[Signed by all the Judges.]

RIGLEY and another v. BIRCH.

Nov. 13.

In the case of a judgment entered by warrant of attorney on a bond conditioned for a sum of money payable by instalments, the Court will not allow execution to issue for any more than the instalments unpaid at the time of the application.

MR. EDWARD WRIGHT moved, on behalf of the plaintiff, for liberty to issue execution on a judgment entered up at the suit of the plaintiff, for the amount of principal and interest due on foot of the defendant's bond. The bond was conditioned for the payment of £162, by four instalments, the first of which became due on the 25th of October last. A warrant had been executed by the defendant, “with a stay of execution until default in payment of the several sums, or of some one or more of them, or of any part of some one or more of them.”—*[Per Curiam.*—Do you require execution for the whole sum in the bond, or for the unpaid instalment alone?—For the whole sum, inasmuch as the bond has become forfeited; *Coates v. Hewitt (a).* Nor is

(a) 1 Wils. 80.

it necessary to suggest breaches under the 9 W. 3, c. 10, s. 8, by reason of the judgment having been entered on a warrant of attorney—*Anterbury v. Morgan* (a); *Cox v. Rodbard* (b); *Kinnersley v. Mussen* (c).

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Per Curiam.

It is not the practice of this Court to allow execution to issue for the whole sum, but merely for the unpaid instalment; and, by adhering to that practice, we guard against all the abuses that might obviously arise from a contrary course. Even if we were to be guided by the words of the warrant, they are, in this particular case at all events, ambiguous as to its having been the intention of the parties, that execution should be issued for the full sum mentioned in the condition, on the default of payment of one of the instalments; but the warrant has fulfilled its duty, by entering up the judgment, which will stand as a security for future instalments. You may therefore take the order* for execution to issue for the gale which was due on the 28th of October.

(a) 2 Taunt. 195.

(b) 3 Taunt. 74.

(c) 5 Taunt. 264.

* Vide the note to the case of *Gorman v. Hincks*, Batty, 531.



KEEGAN v. DEAKIN,

And the Heir and Terretenants of DEAKIN.

Nov. 22.

MR. ORPEN moved for liberty to issue a *scire facias* to revive a judgment which had been entered up in 1831 against two persons of the name of Deakin, one of whom was dead. The application was to issue the *scire facias* against the surviving conusor and the heir and terretenants of the deceased conusor, so that execution might be had of the lands and goods of the former, and of the lands of the latter.—[*Per Curiam.* Is that a regular proceeding?—It is laid down as such in 2 *Archb. Prac.* (*Chitty's ed.*) 824, where reference is made to *Panton v. Hall* (a); and it is recognised in the note to *Underhill v. Devereux* (b).

One of two conusors of a joint judgment being dead, a *scire facias* may issue to revive it against the surviving conusor and the heir and terretenants of the deceased conusor.

DOHERTY, C. J.—Take the order.

(a) Carth. 105.

(b) 2 Wms. Saunders, 72.

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Administratrix of DALY v. KELLY.

Nov. 23.

The Court refused to order certain bills of exchange, &c. in the hands of the defendants, and which were produced and relied on by him at a former abortive trial, to be lodged with the Officer for inspection by the plaintiff, on an allegation that some of them were forgeries.

MR. M. ATKINSON, on behalf of the plaintiff, moved that all the bills of exchange, promissory notes, and vouchers, produced and given in evidence on the part of the defendant, at a former trial had in this cause, might be lodged with the Officer of the Court, or some other Public Officer in the county where the venue was laid, in order that the plaintiff might have an opportunity of inspecting the same, with the view of ascertaining which of them were in the genuine handwriting of the testator, and to enable her thereby to calculate what was due to her as administratrix, so that she might produce the same to the Jury at the next trial. This was an action of *scire facias*, to which a plea of payment had been put in. The defendant had put in evidence a number of bills, to sustain his defence of an actual payment. Some of these had been impeached by the plaintiff as genuine, and witnesses had been produced to disprove the handwriting of the testator on them. The jury not having agreed in their verdict, a juror was by consent withdrawn. Counsel, in support of the motion, insisted, that these documents being the foundation of his defence, he was entitled to an inspection of them; and that the authorities went to the extent, that if a party alleged that a document was doubtful the Court would impound it; *Richy v. Ellis* (a); *Smith v. M'Gonegal* (b); *Tidd*. p. 639 (8th ed.)

Mr. *Close* opposed the motion as unprecedented; all the cases relied on being those in which the instruments were declared on, and were the foundation of the action.

Per Curiam.

This motion is unprecedented, inasmuch as the cases cited are all of them cases in which the instruments required to be lodged were the instruments declared on. The rule for enforcing the inspection of documents is, comparatively speaking, a novelty, there being no instance of it in the older authorities, and we are not inclined to extend it to a case like the present. We shall, therefore,

Refuse the motion, with costs.*

(a) 1 Al. & Nap. 111.

(b) 2 Ir. Law Rep. 272.

* Vide *Threlfall v. Webster*, 1 Bing. 161, and *Jessel v. Millingen*, 1 M. & Scott, 605.

M. T. 1841.
Common Pleas.

Assignee of BERRY v. M'NEILL.

Nov. 25.

MR. BOYCE moved for leave to mark judgment as for want of a plea.— The action was *assumpsit*. The defendant was a female; and the general issued was filed, that "HE did not undertake," &c. Notice had been served on the defendant to amend, which had not been attended to.

DOHERTY, C. J.

No rule on the motion.

Although the defendant, who was a female, pleaded the general issue in masculine gender, the Court would not allow the plaintiff to mark judgment as for want of plea,

although notice had been given to amend.

WHELAN in replevin v. ANNESLEY.

Nov. 24.

THIS was an action of replevin which had been brought down to be tried at the last Cork Assizes. The trial had commenced, but the record was withdrawn by leave of the Judge, in consequence of some doubts raised by the plaintiff's Counsel respecting the statement of the rent in the defendant's avowries, which, it was alleged, should have been as of the late Irish, instead of the present, currency—the plaintiffs consenting, on the terms of being paid all the costs incurred by them in consequence of the notice of trial.

Mr. *Bland* now moved, on the part of the defendant, pursuant to a notice and consent served on the opposite party, for liberty to amend his pleadings, by adding three new avowries and amending another, upon the terms of amending the plaintiff's copy of said avowry, and entering the rules to plead *de novo*, and paying to the plaintiff such costs (if any) as might have been incurred by him by reason of such amendment. To the foregoing notice and consent, the plaintiff had replied that he would sign the consent on the additional terms of the defendant's paying to the plaintiff *the costs of his pleas in bar*, and also the costs incurred by the plaintiffs in consequence of the defendant's notice of trial for the last Assizes. To this the defendant had replied, by offering to pay all the costs incident to the amendment stated in the consent furnished to him, which might be necessarily and fairly incurred by the plaintiff by reason of such amendment; and also to pay him such costs as might be properly

A notice and consent served on the plaintiff, to allow the defendant to amend and add new avowries, on the terms of amending the plaintiff's copy, entering the rules to plead *de novo*, and paying to the plaintiff such costs (if any) as might be incurred by him by reason of such amendment, sufficient, without the additional terms of the defendant paying to the plaintiff the costs of his pleas in bar.

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and fairly taxable or chargeable against the defendant, consequent upon his former notice of trial.

Mr. Boyle Keller.—The costs of the pleas which we have pleaded, are the only subject of contention, and to them we are fairly entitled. We must not only file a new set of pleas to the new avowries, but we shall have to plead anew under the rules to plead; so that the old pleas have become nullities. For, even if we should think proper to plead some, or all, of our former pleas, we could not let them remain as they are on the record, the defendant not having offered to allow us to do so. We have been, therefore, compelled to come in here to get the terms to which we are entitled, and which have not been tendered in their consent, viz., the cost of our former pleas, or liberty to leave such of them as may be suitable to the new avowries on the record.

DOHERTY, C. J.

We think the terms of the consent are those ordinarily used on such occasions. We cannot, by prospective, order what pleas it may be necessary to plead by reason of the amendments. Probably you may have to plead some new pleas—and if so, under the terms of the consent you will be entitled to the costs of them. On the other hand, if any of your present pleas should turn out, under the amendments that will be made, to be nugatory, the Officer will allow you the costs of them. Nor will it be necessary for us to make any order that the present pleas, if suitable, should remain on the record; for it is the obvious interest of the defendant to allow the pleadings to remain as nearly as possible in their present state. The defendant may, therefore, take an order in the terms of his notice and consent, and no costs of the motion.

Let the defendant be at liberty to amend his present, and plead other, avowries, upon the terms of amending the plaintiff's copy, if necessary, and entering the rules to plead *de novo*, and paying such costs (if any) as may be incurred by reason of such amendment.

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LOUGHNANE v. IRWIN.

Nov. 25.

MR. MACDONAGH, on behalf of the defendant, moved that the declaration filed in this case should be set aside, for irregularity in three particulars, viz.: first, because there had been no Counsel's name subscribed; secondly, no bill of particulars had been furnished; and, thirdly, notice had been served of a declaration having been filed on the 15th ultimo, whereas none had been filed until the 16th. On the 23rd a notice had been served on the plaintiff of an application that the defendant, who was a married woman,* should be permitted to appear and plead in person; and a notice of this motion and a consent was, likewise, and at the same time, served, offering to allow the plaintiff to amend in all the foregoing particulars, on the terms of the defendant being permitted to appear and plead in her own proper person—the Officer of the Court having refused to allow her appearance in person. Of this consent the plaintiff had taken no notice; but on the 24th (yesterday), the defendants were served with a bill of particulars, and notice of declaration filed on the 16th, and an order was obtained to amend the declaration by adding Counsel's name to it, by a side-bar rule, or certificate of no plea or demurrer having been filed. That, at all events, is irregular.

The Court will set aside a side-bar rule to amend a declaration, which was obtained pending a motion to set aside the same for irregularity.

Semble—An order to amend a declaration, by subscribing the name of Counsel thereto, ought to be made on motion in open Court, and not by a side-bar rule.

DOHERTY, C. J.—The amendment of the declaration by affixing Counsel's name, is rather too serious a one for a side-bar rule. It is, in my opinion, one of the privileges of the Bar to have it moved in open Court.

BALL, J.—I can only say that such applications are, at the other side of the Hall, canvassed with great jealousy. The Court requires Counsel to come in, and declare that the omission occurred by mistake.

TORRENS, J.—I can only add my testimony, that during my experience, the practice of this Court has been similar to that which my Brother Ball has stated that of the Courts of Equity to be. Counsel brings in the draft, and states the omission to have been a mistake, so as to free the attorney from all blame and imputation.

Mr. *Macdonagh*.—Our complaint is, that there has been an imposition

* A married woman cannot appear by attorney; Co. Litt. 135;
Oulds v. Sansom, 3 Taunt. 261.

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on the Court, in the plaintiff having gone to your Lordships' Officer, to obtain a side-bar rule, without apprising him of the fact that there was a motion pending on the subject.

Mr. *Loughnane*, for the plaintiff.—The first notice we had of any irregularity on our part, was the service on us of the defendant's notice of the 23rd. We then went, and obtained an order by a side-bar rule to amend, by adding Counsel's name to the declaration, when the defendant could not be prejudiced—no plea or demurrer having been filed; we also served him with notice of the amended declaration and the eight-day rule, and offered to amend his copy. If there is any irregularity in amending the declaration, as we have amended, it ought not to be visited on us, the Officer of the Court having misled us in that particular.—[DOHERTY, C. J. On what ground do you resist the appearance of the defendant in person?—The bill upon which we are suing her was accepted by her as a single woman, and the affidavit by the attorney's apprentice only states that she is a married woman by way of recital—"she being a married woman." There is no positive averment.

DOHERTY, C. J.

The averment is sufficiently positive, the object being merely to enter an appearance. Whatever may be the propriety of the practice with respect to the amendment of declarations by adding Counsel's name, the party ought not, as has been done in this instance, to have concealed from the Officer the fact that a notice had been served, and that a motion on the subject was pending. We shall, therefore,

Set aside the side-bar rule to amend, with liberty for the plaintiff to amend his declaration by subscribing the name of Counsel thereto; and let the defendant be at liberty to enter an appearance in person. And let the plaintiff pay the costs of this motion.

JAMES BRADY, in Error, v. THE QUEEN.

(Queen's Bench.)

1841.
Queen's Bench.

Trinity Term.
Jan. 29.
June 4.

ERROR.—This was a writ of error brought by James Brady, the defendant below, who was convicted of a misdemeanor for unlawful combination and confederacy, under the 2 & 3 Vic. c. 74,* to reverse the judgment of the Court below. The first count of the indictment stated, "that on the 24th of August 1839, and long before, there was, and thence continually hath been and still is established in Ireland a society so constituted that the members thereof might and did communicate with, and were known to each other by certain secret signs and certain passwords, and that the said James Brady, late of, &c., being a wicked and evil-disposed person, at, &c., on the 24th of August, and long before, was a member of the said society, and that the said James Brady, after the first of September 1839, to wit, on the 5th October, in the 3rd of Victoria, of, &c., with force and arms at, &c., being then and there such member of the said society aforesaid, unlawfully did act as a member thereof, against the peace of, &c., and contrary to the form of the statute, &c. Second count—And that afterwards, and during the existence of the said society, to wit, on, &c., at, &c., the said James Brady, well knowing the premises, and being such &c., person, unlawfully did, directly, knowingly, maintain correspondence with one Richard Jones, he the said Richard Jones then and there being secretary of the said society, as such secretary. Third count—And that the said James Brady, on, &c., well knowing, &c., did directly, knowingly, maintain a correspondence with one R. Jones, the said Jones then and there being a member of the said society, as such member. Fourth count—And

Where a statute declared that from and after the 1st of September 1839, any and every society established at the passing of the act, or thereafter to be established, of the nature thereafter described, "shall be and be deemed and taken to be an unlawful combination and confederacy;" and then proceeded, "that is to say, any and every society so constituted that the members thereof may or shall communicate with or be known to each other by, or may use, for the purpose of being known as such, any secret sign or signs, or pass-

word or passwords," &c.; and having continued a specification of several other matters, the existence of which in any society would constitute it a society within the statute, it declared that the persons so offending "shall be deemed guilty of unlawful combination and confederacy;" an indictment under this statute stated, "that on the 24th of August and thence continually hath been and still is established in Ireland a society so constituted that the members thereof might and did communicate with and were known to each other by certain secret signs and certain passwords, and that said James Brady, &c., on the 24th of August, and long before, was a member of the said society; and that the said James Brady, after the 1st of September 1839, to wit, on the 5th of October, &c., being then and there such member of the said society as aforesaid, unlawfully did act as a member thereof, against the peace," &c. &c.:—*Held*, upon a writ of error brought to reverse the judgment, after verdict, that this count was sufficient, without any averment to the effect, that the defendant was thereby guilty of unlawful combination and confederacy.

Semble—That the count would be bad upon demurrer by reason of this omission.—Perrin, J.

Semble—That a count under this statute, charging the defendant with having "in his possession a certain written copy of certain passwords made use of in the said Society," without setting them out, is bad.

Smith's Case (1 East, P. C. 183; S. C. 2 Bos. & Pul. 127), and cases of the same class, questioned.—*Per* Perrin, J.

* See this enactment in note to *Regina v. Houston*, ante, vol. 3, p. 446.

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"that the said James Brady, on, &c., well knowing, &c., unlawfully did
 "indirectly, knowingly, maintain correspondence and intercourse with the
 "said R. Jones, he the said R. Jones then and there being a member of
 "such society, as such member. Fifth count—And that the said J.
 "Brady, on, &c., well knowing, unlawfully, knowingly, had in his posses-
 "sion a certain written copy of certain passwords made use of in the said
 "society, he the said J. Brady then and there not being able satisfactorily
 "to account for the same. Sixth count—And, also, that the said J. Brady,
 "on, &c., well knowing, &c., unlawfully, knowingly, had in his possession
 "a certain secret mode of communication made use of by the said society,
 "he the said J. Brady not being able satisfactorily to account for the
 "same, against the peace, &c., and contrary to the form of the statute,
 "&c." The several counts concluded against the peace, &c., and con-
 trary to the form of the statute.

To the record of this indictment and the judgment thereon, several causes of error were assigned, but it is unnecessary to set them forth here, as those relied on are fully stated in the arguments of Counsel.

Mr. *Napier* in support of the errors assigned.—The offence in this case is exclusively statutable, founded on the 2 & 3 Vic. c. 74. The offence created by that act is, that of *unlawful combination and confederacy*, and the party transgressing is liable to be proceeded against, as under the 4 G. 4, c. 87, and as if guilty of unlawful combination or confederacy thereunder. The 4 G. 4, c. 87, was itself an extension of the 50 G. 3, c. 102, and it created certain offences of unlawful combination and confederacy; and the object of the 2 & 3 Vic. c. 74, was to suppress certain societies, theretofore permitted to exist, but then considered mischievous. The latter act received the Royal assent upon the 24th of August 1839, and was to take effect as to the creation of offences from the 1st of September 1839. There were two classes of cases provided for; first, societies established; secondly, societies to be established, the constitution of which should be such, that after the 1st of September 1839 the members might be known to each other by secret signs and passwords. The indictment therefore should charge, first, that such a society existed after the 1st of September 1839, as may be deemed an unlawful combination and confederacy; and that should be done by averments that the members thereof might after the 1st of September be known to each other, &c., by certain *specified* signs and passwords, and that said society was, and is, an unlawful combination and confederacy; that traverser after that day acted as a member of, or had correspondence with some member thereof as such. In the present case there has been a verdict, and therefore certain objections are cured by the 31st and 32nd sections of the 9 G. 4, c. 54; the particular specified defects enumerated in the 31st section are aided by the verdict, but none other; and, there-

fore, unless the defects in this case come under the protection of the 32nd section, which provides, that it shall be sufficient after verdict if the offence be described in the indictment *in the words* of the statute creating the offence, &c., they are not cured. For the purpose of considering this, it is necessary rightly to understand the effect and operation of the 9 G. 4, c. 54. Formerly in many cases, the mere words of the act did not in the indictment express the offence with that certainty required for the purposes of trial, but it was necessary to add words in the indictment to make out the substance of the offence. 2 *Hawk. P. C.* c. 25, s. 111; 3 *Inst.* 54. The 9 G. 4 merely aids this as to the offence. The 7 & 8 G. 4, c. 64, s. 21, is the analogous enactment in England, and in that country it has been decided, that notwithstanding that enactment, it is not always sufficient to follow the words of the statute merely: *Regina v. Norton* (a); *Regina v. Martin* (b). In the indictment in the present case, from the first to the last the words *unlawful combination or confederacy* are not to be found, which is the precise offence created in terms by the 2 & 3 Vic. c. 74. That this is so is manifest from *Regina v. Callen* (c), which was a case decided upon this statute before Burton, J., and Foster, B., at the Summer Assizes 1840; in that case and also in all the indictments upon the North East Circuit under this statute it was stated, that "thereby the party became guilty of *unlawful combination and confederacy*," and in this case Burton, J., said, "I think the offence created by the act is the offence of unlawful combination and confederacy, and that it sets out several acts, any of which makes the party guilty of that offence. Here then the indictment has charged several of these, and that he became thereby guilty of unlawful combination and confederacy—that is the only offence with which the party is charged. I think when we examine the statute here, we find it has been very careful in stating what the offence is, and in stating what act or acts shall bring a party within the offence of combination or conspiracy." This indictment has wholly omitted either to aver that the society therein described was at any time an unlawful combination or confederacy; or that the traverser was guilty of unlawful combination and confederacy. Such omission is in itself fatal. Where an offence created by statute is descriptively specified therein, the very words of description must be used; *Com. Dig. Indict. G.* 6; *Bac. Ab. Indict. H.* 13; *Bro. Ab. Indict. Pl.* 19; 2 *Hawk. P. C.*, c. 25, s. 110; 2 *Hall, P. C.* 170; *Regina v. Ryan and O'Connor* (d); *Rex v. Johnson* (e); *Rex v. Pearson* (f); *Rex v. Fuller* (g); *Rex v. McGregor* (h), and *Rex v. Critchton* (i);

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(a) 8 C. & P. 196.

(b) 8 Ad. & El. 481; S. C. 3 Nev. & P. 473 (e).

(c) Not reported.

(d) 7 C. & P. 854; S. C. 2 Moo. C. C. 15.

(e) 13 M. & Sel. 540.

(f) 1 Mood. C. C. 313.

(g) 1 B. & Pul. 186.

(h) 3 B. & Pul. 100; S. C. 2 East's P. C. 576.

(i) R. & Ry. 62, 63, note (a).

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and for precedents framed upon similar statutes, *Rex v. Ball* (a); *Rex v. Loveless* (b). Upon these authorities this objection appears in itself conclusive against the validity of this indictment; but, secondly, the signs and passwords are not specified in the indictment. The case of *Regina v. Martin* shews that the statute does not supersede the necessity of specification; and the principle decided in *Rex v. Mason* (c), and the reasons assigned apply strongly to this part of the present case. How is the defendant to meet the case in evidence? Thus suppose he had for some collateral purpose a correspondence with fictitious signatures, confined to himself and another charged as a member, if the secret signs and passwords are not stated in the indictment, how is he to defend himself? Or suppose there had been secret signs and passwords used by a society of which he was a member, but these had been discontinued by a general resolution of the body before the 1st of September 1839, how could he shew this? And again, is it to be left to the judgment of the witness to say what is a secret sign? If such pleading were permitted in an indictment it would greatly tend to embarrass the traverser in his defence, and for that reason has been always held bad; *Rex v. Forsyth* (d); *Regina v. Peck* (e); moreover, the Grand Jury may find bills upon one set of signs, which may be innocent, and the evidence at the trial may be of others, which also makes the indictment clearly bad; 4 *Com. Dig. by Hamd.* 530, note (h). The last objection is one upon which I rely with great confidence, and it is that the society referred to is not shewn to have been illegally constituted, so as to continue the power of secret communication after the 1st of September 1839; which should have been done to have brought the case within the statute. The rules upon this subject are fully stated in *Com. Dig. Indict. G. 3* (g), and 4 *ibid.* by *Hamd.* 530; and *Rex v. Cheere* (f), is a very strong authority upon this part of the case; in the present case not only is it consistent with the indictment, but it is the strict meaning of the words, that the secret signs were available *at a time past*, "might, and *did*, and were known." The Orange Society at this moment would be within the words of this indictment, although they had long since abolished secret signs; or a society which had yearly signs which expired and were not renewed prior to September 1839. Upon these grounds I submit this indictment is bad; first, the society here is not described in the words of the act of Parliament, not being called an unlawful combination and confederacy; secondly, it is not shewn to have had the character of communicating, &c., by secret signs and passwords, after the 1st of September 1839; and thirdly, the secret signs and passwords are not

(a) 6 C. & P. 563.

(b) 1 M. & Rob. 349.

(c) 2 T. B. 581.

(d) R. & Ry. C. C. 274.

(e) 1 P. & Dav. 508; S. C. 9 A. & E. 686.

(f) 4 B. & C. 902; S. C. 7 D. & Ry. 461.

specified. The first is so clear that no legal mind can doubt upon it—it is that the defendant is not charged with being a member of an illegal combination and confederacy, and that this defect is not aided by the 9 G. 4; for the words of the act of Parliament have not been used, viz., “unlawful combination and confederacy.”

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Mr. *Smyly*, in support of the indictment.—I concur in most of the legal positions laid down by Mr. Napier, and I do not mean to impugn the authority of any of the cases upon which he has relied; but I submit that the 9 G. 4, does relieve me from dealing with any matters except those left unprotected by that statute. It will be useful to state a few general rules of criminal pleading. One rule is, that all the material facts and circumstances comprised in the definition of the offence, whether the offence be one at common law or created by statute, must be stated in the indictment; and this rule will dispose of several of the cases cited by Mr. Napier. Thus in the case of larceny, it is not sufficient to allege that the party feloniously stole the goods, or in burglary, to use the words of the statute, and merely say that he committed burglary, but you must state facts comprised in the definition. This is also true of embezzlement, which is defined to consist in deceitful practices in defrauding, &c., *another* of his known right, &c.; 1 *Hawk. P. C. c.* 23, s. 1. The cases cited upon this point by Mr. Napier, were deficient in not stating the property embezzled to be the property of *another*, and that was a necessary part of the statement, being one ingredient in the definition of the offence; and this is the extent of the cases of *Rex v. Johnstone* and *Rex v. M'Gregor*. But not only must the facts included in the definition of the offence be given, but where the subject matter is a breach of duty, or the interference with another in the discharge of a duty, the facts from which the duty arises must, except in the case of a Public Officer, be stated in the indictment, and that is the only proposition decided in *Rex v. Cheers*. There is another class of cases shewing that when a technical word descriptive of the offence is omitted, the indictment will be bad; as if a statute, in defining an offence, use the word “unlawful,” that word must be used in an indictment for that offence; *Rex v. Ryan and O'Connor*, is an instance of this rule, and no doubt that is the law. The indictment in the present case is for a misdemeanour created by statute, and of course the indictment must contain the whole of the facts included in the definition of that offence; and also, all the technical words found in the act, but nothing more than this is requisite, *Rex v. Pemberton (a)*, *Rex v. Fuller*; and it is not necessary to set out matters of evidence, *Rex v. Turner (b)*; nor to state matters which lie more peculiarly within the knowledge of the defendant

(a) 2 Barr. 1035.

(b) 1 Str. 139.

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than the prosecutor, *Rex v. Hollond* (a); and matter of inducement need not be set out with the same certainty as other parts of the indictment; *Rex v. Wright* (b): all these general propositions will be found useful in the argument of this case. After referring particularly to the enactments of the 2 & 3 Vict. c. 74, Mr. Smyly continued—All the societies therein described are declared to be illegal, and they became so by this act of the Legislature after the 1st of September 1839. Their illegality does not depend upon the finding of the Grand Jury or of the Petit Jury; and after a verdict establishing that the defendant was a member of a society described by the statute, and that he acted in contravention of the prohibition in the statute, the Court will take judicial notice, and deem and declare such society to be an unlawful combination and confederacy, and pass the sentence proper to such an offence. That is not a fact that need be set forth in an indictment; it is a mere conclusion of law, when the Grand Jury find that the individual charged did such and such acts; and you must establish, by evidence, that the defendant was a member of a society having the characteristics set out in the statute. “Secret signs and passwords” are introduced into the act, only to shew what species of society is illegal; the prosecutor may not be able to prove what are the signs, although he can prove that the members communicated with one another by “secret signs and passwords.” —[BURTON, J. remarked that the Freemason Society was excluded from the operation of the act.]—It might as well be contended that in an indictment under another portion of this statute, against a party for being a member of a society that collects money for the purchase of arms for distribution, that the particular arms, and the particular funds ought to be specified.

Mr. Napier.—I did not contend that the secret signs should be set out in the indictment, but that the passwords ought to be.

Mr. Smyly.—But if it be not necessary to set out the one, why should it be necessary to set out the other? they occur in the same clause of the same section of the statute. The first objection I have endeavoured to answer, by shewing that the act of Parliament declares certain societies unlawful; and a party to be guilty under this act is to be a member of a society so constituted that the members thereof may and shall communicate, &c., and being such member shall act as such; the Jury finds those facts, and then the Court deems him guilty of an unlawful combination. The second objection, I trust, I have fully answered. The third is, that the indictment does not allege that after the 1st of September 1839 there did exist any society capable of communication by secret signs and passwords. This objection is capable of two answers; one from reading the words of the indictment; and, secondly, if one part of the count

(a) 5 T. R. 607.

(b) 1 Vent. 169.

contain a sufficient offence to warrant a judgment it is good. What are the words of the present indictment? it expressly avers the present existence of a society which had existed before the passing of the act of Parliament and at the passing of the act, and that it still existed up to the time of finding the bill. The averment, that they might and did communicate, &c., may be divided, and then it would be an averment that they might up to that time, or that they did up to that time, communicate, &c.; but without dividing it, it is an averment that up to the time of finding the bill, the members of that society might and did communicate by secret signs and passwords; and thus either way the averment would be good. With respect to the observation that innocent persons would be included in the words of this indictment, it is only necessary to see what society it speaks of, viz., a society the members whereof communicate with each other by secret signs and passwords; and no person can be a member of that society and not be guilty under that statute. Upon these grounds, therefore, I submit that the indictment is good.

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A question here arose as to the party who was entitled to the reply; Mr. Napier insisting that in writs of error, even in common cases, the party who commenced was entitled to the reply, that it had been frequently so ruled in England; *Rex v. Bourne* (a); *Regina v. Frost* (b); *Rex v. Stannard* (c); *Rex v. Horne* (d); *Rex v. Abbingdon* (e): while Mr. Monahan and Mr. Smyly upon the other hand contended that the invariable practice in this country was to give the Crown the reply; and that it had been lately so decided in *Holland v. Regina* (f).

In this country, in all criminal cases, even where the defendant brings a writ of error, the Counsel for the Crown are entitled to the reply: *aliter*, in England. This Court will consider the present practice, with a view of altering it.

Per Curiam.—The English practice is with Mr. Napier, but the practice in this country has always been otherwise; the Crown Counsel having been always allowed to have the reply.

PERRIN, J.—The question was raised in *Rex v. O'Connell* in 1834; in that case my junior opened, and the Attorney-General followed him; the Court then called upon me to go on, and I insisted upon my right to reply, and that the Solicitor-General ought to go on, and the Court decided that I should go on, which I did, but the Solicitor-General (Mr. Justice Crampton) did not follow me. In *Rex v. O'Grady* (g) also the Attorney-General replied.

CRAMPTON, J.—It has been the practice in this country to give the

(a) 7 Ad. & E. 58.

(b) 9 C. & P. 185.

(c) 7 C. & P. 675.

(d) 20 St. Trials, 664.

(e) Peake, 236; S. C. 1 Esp. 226.

(f) 2 Ir. Law Rep. 335.

(g) Greene's Report.

T. T. 1841. Crown the reply, and this point was decided here last Term in *Regina v. Queen's Bench. Holland*, where the Crown had the reply; such has been the invariable practice in this country, but, perhaps, it ought to be altered. The practice of the Court is, however, the law of the Court until it is changed.

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BURTON, J.—What has been suggested by my Brother Crampton is perhaps the best course to follow. The English cases are against our practice; the practice in this country may have been wrong, and it may be desirable to alter it; but we ought not to make the alteration in a case where every one has come into Court under the expectation that the usual practice is to be followed. If we should upon consideration think fit so to do, we will in future alter that practice, and then inform the Bar of the alteration, but in the present case we feel that we ought to abide by the established practice.

Mr. *Napier* then replied, and insisted that no answer was given to his first objection to the indictment, and was followed by—

Mr. *Monahan*, who contended that the indictment was not open to the objection relied upon, and that even if it were upon demurrer, that the defect was cured by the 9 G. 4, and upon this part of the case relied upon *Res v. Moses* (a).

June 4.

BURTON, J., this day delivered the judgment of the Court.

This case comes before the Court upon a writ of error, and was argued in the absence of my Lord Chief Justice. It has stood over a length of time for judgment, in consequence of doubts that were entertained upon one of the objections taken to the first count of the indictment, and which objection extends also to all the other counts of the indictment. The objections, however, to the other counts, it will be immaterial now to consider; the Court being of opinion that the first count in this indictment is sufficient, that is all that it will be necessary to refer to in their judgment upon this writ of error; for if the first count be good, whatever objections may exist as to the other counts, the judgment below must be affirmed. The first count states the existence of a certain society of the description specified in the statute 2 & 3 Vic. c. 74. It is stated to be "A society so constituted that the members thereof might and did communicate with and were known to each other by certain secret signs and passwords." One of the objections made to this indictment is, that it does not describe the society as being so constituted as to render the members thereof capable of communicating with and being known by secret signs, and to have so continued constituted

(a) 7 C. & P. 423.

after the 1st September 1839. This objection cannot, upon the just construction of the words of the indictment, be allowed to prevail. The statute directs, that from and after the 1st of September 1839, any and every society then established, or thereafter to be established in Ireland, of the nature thereafter described, shall be and be declared and taken to be an unlawful combination and confederacy, that is to say, any and every society so constituted that the members thereof shall or may communicate with or be known to each other by, or may use for the purpose of being known as such by any secret sign or signs, password or passwords, &c. The averment in this count of the indictment is, that on the 24th of August 1839, there was and from thence continually hath been, and still is established in Ireland a society so constituted, &c.; now this term "continually hath been" is properly applicable, and in fair construction must be applied to the capacity of the members of this society being known to each other as such by secret signs; and so far is a description of the species of society designated and made illegal by the statute. Another objection taken is, that the signs and passwords by means of which the members of the society were known to and did communicate with each other, have not been set forth in the indictment; but the Court is of opinion that this objection cannot prevail, first, because these secret signs are not necessary to have continuance in the society: it is manifest they may be, and indeed are intended to fluctuate and change from time to time, to suit the secret purposes of the society; and secondly, because they are matters lying peculiarly within their knowledge, being communicated exclusively to persons who belong to the society. This disposes of the second objection to the first count; but this observation, however, is not to be considered as an answer to another objection taken to the fifth count in the indictment, namely, the objection for not setting out upon the indictment the signs and passwords contained in a copy of the signs and passwords alleged to have been found in the possession of the defendant. The consideration of that question is not necessary upon the present objection, which arises upon the first count only; and the Court give no opinion, therefore, upon it. The third objection is the want of the averment of the specification of the offence contained in the words of the statute, namely that the society therein described was an unlawful combination and confederacy. That such an averment might have been made there can be no doubt; but the question here is, whether such an averment is essential to the validity of this indictment. It has been said that the statement in the indictment is merely a statement of the evidence of the offence which the statute creates; but I apprehend that is not quite correct. The fact of being a member of such a society is not evidence of the offence, but is an offence itself; it is a fact constituting an offence within the statute; and so likewise is the fact of holding correspondence as such member; and so

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are all the several other acts stated upon the indictment; and the question is, whether the statement of the act, or of the matters of fact, which the statute contemplates as the offence, shall be sufficient, or whether such statements must be followed by a conclusion, that that constitutes what the statute has declared it shall be deemed to be, namely, "an unlawful combination and confederacy." Whatever might be thought of this objection if it were *res integra*, it is now too well settled by authorities that cannot be mistaken; *Michael's Case* (a); *Smith's Case* (b); *Booth's Case* (c). The result of all those cases is as it is stated in 1 *Chitty Crim. Law*, 232, that it is not necessary to state a mere conclusion of law resulting from the facts of the case. It is sufficient to state the facts, and leave the Court to draw the inference; and *Michael's Case* goes further, and says, although the Court is to draw the inference, it is not necessary the Court should adjudge the offence, it is sufficient to adjudge the sentence; and this was the decision in *Smith's Case*, made not only upon the reason of the thing, but upon a careful examination of the precedents, ancient and modern. It was, moreover, a decision made upon discussion, and one which has never been since questioned. It is, however, to be remarked, that although this is a well established general rule, it is not universal. There may be, and are, and have been cases in which it is necessary to draw a conclusion of law, as where that conclusion involves matter essential to the crime stated in the statute. Such were the cases of *Rex v. McGregor* (d), and *Rex v. Johnston* (e); in the former of these cases the statute 39 G. 3, c. 85, having declared that certain acts of embezzlement should amount to the crime of larceny, where the goods of some person should be taken away, it was, therefore, necessary to have such a specification in the indictment that the new offence created by the act of Parliament being a larceny, it must be described in the indictment as such, and with all the properties of a larceny; and in the case of *Rex v. Johnston* the proper specification was made, and the distinction of law stated, and to that an objection was taken that the words of the indictment did not state the notes taken were the property of the party, or that the defendant stole them, but the Court overruled that objection, holding this to appear sufficiently in the conclusion of law which was drawn. There are other exceptions or qualifications of this general rule; but in truth these very cases are, if not exceptions to it, at least qualifications of it; and there are also other exceptions to this rule—for instance, cases of homicide are exceptions to it. The rule, although general, cannot be represented as an unqualified rule; in the first place,

(a) 2 Leach, C. L., 4th ed., 941.

(b) 1 East, P. C. 183; S. C. 2 Bos. & Pul. 127.

(c) Rus. & Ry. C. C. 7.

(d) 3 Bos. & P. 106.

(e) 3 M. & Sel. 539.

there may be cases in which it may be necessary or advisable that such conclusions or deductions of law should be averred; secondly, there is no case in which such an averment, if true, would be objectionable; and, thirdly, there are cases in which such an averment is unnecessary. The precedents in which such a conclusion is usually made, have in some degree raised or influenced the doubts that have been entertained in the present case, and some time, therefore, has been taken to look further into these precedents; in some of the cases that have been adverted to, that course of searching into precedents was taken, and, therefore, it was thought right to search in this particular case now before the Court. Upon such search it appears that averments of the kind referred to most usually occur in indictments for perjury; and finding that in indictments for perjury it has been usual to add the averment that the party committed wilful and corrupt perjury, the practice of thus introducing the averment of this legal conclusion may be considered as having strengthened the doubts that have been entertained upon the present case. With respect, however, to the search into precedents I have referred to, while the result of that search is not made the foundation of the judgment of the Court, I may mention that it appears from that search, and it is so stated in 1 *East Pleas of the Crown* 184, that judgment had been given upon indictments which did not contain such an averment, and that as a general rule it is not necessary to state in the indictment what is mere conclusion of law. It is stated by Mr. Starkie, in the 1st vol. of his *Criminal Law*, 208, that this conclusion is necessary in cases of homicides, and that it is usual (drawing a distinction between perjury and homicide) in cases of perjury. And it will be found in 2nd *Chitty's Criminal Law*, 312, thus:—"After the perjury has been assigned, the indictment usually concludes 'that so the defendant did commit wilful and corrupt perjury;' " and cites 2 *Leach*, 860, and *Starkie*, 195: "but it should seem," adds that writer, "that this conclusion of law, from the premises, is immaterial." I have now to mention a case that has been cited in argument, as bearing somewhat upon the present subject; I mean the case which came before Baron Foster and myself last Circuit; and according to my recollection of that case, the decision to which we came upon it does not at all conflict with the authorities I have already cited. That case was one in which one or more counts of the indictments (which was also framed under the 2 & 3 Vic. c. 74) stated several of the offences created by the statute, and then averred—"and so the defendant was guilty of an unlawful combination and confederacy." An objection was taken to one of the counts for duplicity, in thus stating several offences; but it was considered by Baron Foster and myself, that the several offences stated were in the nature of overt acts, and that the count was not open to the charge of duplicity; but no argument took place as to the necessity of stating the conclusion of law,

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T. T. 1841. *Queen's Bench.* that so the defendant was guilty of unlawful combination, &c., the indictment having made that averment in that count. At all events, upon the whole of this case, we are of opinion that the first count in this indictment is good, and that the judgment must be affirmed.

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PERRIN, J.

I have been the occasion of the delay that has occurred in pronouncing judgment in this case, by reason of doubts I entertained upon the case; and, I must say, that I still entertain considerable doubts upon it. There were three objections taken to the first count of the indictment; but upon the one last observed upon by my Brother Burton, is the objection upon which I entertain these doubts; for, I confess, I do still feel considerable doubts whether even after verdict the first count of this indictment is sufficient. The other counts in this indictment were not made the subject of argument, and although I observe they are framed in a very novel form, it is not necessary to remark further upon them; for if there be one good count in this indictment, it is sufficient to support the judgment. With respect to the first count, my difficulty rests upon this, that the count does not charge the defendant with being guilty of an unlawful combination and confederacy: the proper course of pleading would have been, to have charged the existence and continuance of a society coming within some of the provisions of the statute; and more accuracy with respect to the offence charged might at least have been used. It was not, however, necessary to set out the passwords or secret signs in the indictment; for, whatever their character was, however harmless or the reverse they may have been in themselves, that cannot vary or affect in any way the offence; but I do think that the document referred to in the fifth count ought to have been set out. I am not, in what I am saying, to be understood as now dissenting from the judgment of the Court as pronounced by my Brother Burton; but I should still hold it necessary, to render the indictment free from objection, to state the existence and continuance after the 1st of September 1839 of the society, and that the defendant was a member thereof; and that being such member, he, after the 1st of September 1839, acted as a member thereof. That would have been the proper course to have taken, in order to give a guilty character to the act—to shew that it was in furtherance of the unlawful society that he acted, and so bring the case within the words and spirit of the statute. An isolated act of an individual would not constitute an offence within the spirit of the statute; the act must be done in furtherance of the objects of the society. Suppose, for instance, a party becoming apprised of the existence of this statute, he having been a member of this society—and suppose he then went forward to withdraw himself from the society, and that having had the books or papers of the society, he went and resigned the possession of them, and at the

same time declared his intention from thenceforth to abandon that course—it might be said that that was “an acting as member of the society;” and yet it would clearly not be an offence within the meaning or spirit of the act of Parliament. And another case might be put, in which a party might be innocently in possession of property belonging to the society, without any intent to act further as a member, which would not constitute him a member of an illegal society. It would, therefore, I repeat, have been proper to have described the act to have been done so and so, and that so the party “was guilty of an unlawful combination and confederacy;” and that should be done either by setting out the act itself, so as to shew that it amounted to the offence of unlawful combination or confederacy; or otherwise, by charging that it was an act of unlawful combination and confederacy; and if this objection were taken before verdict, and had this been an argument upon demurrer, I think still that that would have been the conclusion to which I should have come. It is not a sufficient answer to say that this is a conclusion of law founded upon the facts: the facts may be within the words, although not within the spirit of the statute; and that conclusion should have been made as averring the facts within the spirit as well as the words of the act of Parliament. It was the ancient rule of criminal pleading, that such conclusion, or a charge tantamount thereto, should be made. This appears to be still the rule in cases of murder and perjury; and upon looking into the authorities, I apprehend such has been the rule in all cases: and with respect to modern text-writers, I feel great difficulty in yielding established rules of law to their opinions, no matter how highly I may respect them. With respect to *Smith's Case*, and others of that class, they constitute an anomaly in the law, and have been decided upon the fact that several convictions had taken place upon similar indictments before the objection was raised. It also strikes me, that a further difficulty, which weighs upon my mind, has not been sufficiently answered, namely, that the offence, as charged here, is not charged with sufficient accuracy to enable the prisoner to know what it is he is to come prepared to meet, without stating that he unlawfully combined, or something tantamount thereto. It has been said that it would not be sufficient to state that he did unlawfully combine, &c.; and thence it has been argued that the facts have been set forth, and that the offence has been stated in the words of the statute, and, therefore, that the objection, if there be one, is cured by the 9 G. 4, c. 54; and it does appear to me that the offence is described in the words of the statute, and that for that reason the objection is now cured; but I would find it difficult to hold that that would be a sufficient description of the offence before verdict, consistently with the case ruled before Baron Foster at Monaghan, where it was held that the offence was that of an “unlawful combination and confederacy;” and that the indictment, in stating the facts,

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only set forth the overt acts, making the party guilty of that offence. It may be found necessary in an indictment to adopt a fuller description of the offence than is contained in the statute. It often happens that the description in the statute is not sufficiently minute; there is often great difficulty in requiring such precise, limited and exact expression in indictments, and the doing so, I admit, may often defeat justice, perhaps; but then it is dangerous to depart from the established principles of pleading, and to hold that an indictment is good, although it does not charge an offence within the spirit as well as within the words of the statute; moreover the case of *Green v. Martin (a)* establishes this, that the statute of *George 4* has not altogether abrogated these principles. I have, therefore, much doubt whether, upon demurrer, this indictment could be sustained; even at the present period of this case, I have not been able to discharge my mind of the doubts I entertained; but as the majority of the Court are clear upon the point, I presume my doubts have no substantial foundation, and that the count is now sufficient.

Judgment for the Crown.

(a) 8 A. & El. 481.

1840.

Nov. 21.

Hilary Term.

1841.

Jan. 30.

WALSH v. HENDERSON.

In an action for libel, it is not necessary to set out in the declaration a document referred to in the libel, which does not contain matter material to the sense, or does not alter the meaning, of the libellous paragraph.

LIBEL.—The declaration, which contained five counts, stated, that the plaintiff was heretofore, &c., a prisoner at the suit of John Archbold, in the gaol of Waterford, and being such prisoner, he afterwards, &c., duly exhibited his petition to be discharged under the provisions of the statutes for the relief of insolvent debtors in Ireland; and accordingly was afterwards duly discharged as such insolvent debtor; that a certain indictment for perjury had been exhibited at the Assizes held on the 9th day of July 1839 in and for the county of the city of Waterford, against Robert Ahearn and Thomas Egan, who were tried and, thereupon, convicted:—that the plaintiff had been then and there examined on oath, and had given his evidence as a witness upon the trial on behalf of the prosecution against the said Robert Ahearn and Thomas Egan; yet the said defendant, &c., heretofore, &c., in a certain newspaper called *The Waterford Mail*, falsely, wickedly and maliciously did compose and publish of and concerning the said plaintiff, and of and concerning the insolvency

of the said plaintiff, and of and concerning the said prosecution, and of and concerning the evidence given by him, the said plaintiff, on the said trial, as a witness, as aforesaid, a certain false, scandalous, malicious and defamatory libellous matter following:—that is to say. [The declaration then set out the libel, which, without the inuendoes, was as follows:] “It “has been so frequently our painful duty to animadvert upon the conduct “of the Irish executive, that we feel peculiar pleasure in recording an “act of justice exercised by his Excellency the Lord Lieutenant, in favor “of Robert Ahearn and Thomas Egan, collectors of minister’s money, “who were convicted of perjury at the Summer Assizes for 1839: and “it is the more praiseworthy as his Excellency, in thus acting upon the dic- “tates of his own judgment, must have thrown off for the nonce the shackles “of the O’Connell clique. Our readers may recollect the pertinacity “with which the prosecution against these unfortunate men was carried “on, notwithstanding the repeated remonstrance of the presiding Judge, “and the very intelligible hints of the Crown Counsel, who reluctantly “lent themselves to the prosecution: they may also recollect the almost “universal feeling of dissatisfaction which the verdict created in the “public mind—that a memorial numerously signed was immediately for- “warded to his Excellency, praying for the immediate liberation of the “prisoners. Hopeless as the case appeared, a few individuals, convinced “of the innocence of the condemned party, persisted in their application, “and at length his Excellency peremptorily declined interfering, on the “ground that the characters of the prosecutors, as far as had been shewn “by the memorialists, remained still unimpeached: the hint was not “lost on the Solicitor for the unfortunate convicts, as he forthwith “instituted an inquiry, which brought to light a series of transactions of “so suspicious a character, that the clue obtained in the course of the “investigation led the creditors of one of the prosecutors to revive some “dormant proceedings of long standing in the Insolvent Court, whilst “the new assignee appointed by that Court felt himself constrained to “file a bill in the Court of Chancery, charging him with a fraudulent “transfer of his property prior to his insolvency; and almost at the same “period another of the prosecutors, who had held the situation of steward “of the Mendicant Asylum in this city, was detected in the perpetration “of a series of frauds of so gross a nature that the manager instituted “a prosecution against him at the last Assizes, which proved successful, “whereupon he was sentenced to an imprisonment double the duration “of that which had been previously awarded to the individuals con- “victed by the aid of his testimony. These events following in rapid “succession, demonstrated to his Excellency the real characters of the “first prosecution, and procured the immediate liberation of Ahearn and “Egan. But his exalted sense of justice would not permit him to rest “satisfied with this partial measure of redress, when he learned that the

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"conviction had entailed on those individuals the forfeiture of their civil rights; and accordingly, after an interval of six weeks, a period affording time for a rigid scrutiny of the various documents which had been submitted to his consideration, his Excellency resolved to efface the stigma that had been cast upon them, and which otherwise was indelible, and to restore them to their former humble station in society, by according to them her Majesty's free pardon under the great seal, which has been prepared at the expense of the Crown, and transmitted to the Sheriffs of this city." The declaration then concluded in the usual form.

The following passage was annexed to the article in question, but was omitted in all the counts of the declaration. "We subjoin a copy :—
 "By the Lord Lieutenant General and General Governor of Ireland, *Ebrington*. Whereas at a General Assizes and Gaol Delivery held at Waterford on the 9th July 1839, Robert Ahearn and Thomas Egan were convicted of perjury, and ordered by the Court to be imprisoned for twelve months. Upon some favourable circumstances represented unto us on behalf of the said Robert Ahearn and Thomas Egan, we think fit to extend her Majesty's mercy unto them, and to grant them a free pardon for the said offence, remitting and releasing them from the crimes of which they were convicted as aforesaid; and all convictions and attainders thereupon, and all pains and penalties thereby by them incurred. These are, therefore, to direct and require you to adopt such measures as may be necessary on your part for extending her Majesty's most gracious pardon unto the said Robert Ahearn and Thomas Egan, discharging them from the sentence incurred by them; and for so doing this shall be your warrant. Given at her Majesty's Castle of Dublin, the 23rd April 1840. By his Excellency's command.
 W. T. Hamilton.—To the High Sheriffs of the city of Waterford, and to all Sheriffs, Gaolers, and all others concerned in the execution of the above order."

The defendant pleaded not guilty to the whole declaration, and eight pleas of justification applying to the first four counts, leaving the fifth count uncovered by any plea of justification. The plaintiff joined issue on the plea of not guilty, and to the other pleas, replied *de injuriâ suâ propriâ*, &c., concluding to the country. Issue being joined, the case was tried before Mr. Serjeant Moore and a Special Jury, at the last Waterford Summer Assizes. The plaintiff examined three witnesses who proved the publication, and the application of the libel to the plaintiff. The defendant examined a great number of witnesses in proof of his pleas of justification. The Jury found a verdict for the plaintiff, with six pence damages, on all, except the seventh, eighth, and ninth pleas, on which a verdict was found for the defendant. The defendant's Counsel, at the close of the plaintiff's case, called for a nonsuit, on the

ground that there was a variance between the libel proved, and that declared upon, inasmuch as the subjoined copy of the pardon was not set forth in the declaration. The learned Judge refused to nonsuit the plaintiff, but reserved liberty for the defendant to move to have the verdict found for the plaintiff set aside, and a nonsuit entered. A rule *nisi* having been obtained on that ground to set aside the verdict for the plaintiff—

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Mr. *Hatchell*, Q. C., now shewed cause.—The only question for argument in this case is, whether there is any variance between the libel, as set out in the fifth count of the declaration, and the article in *The Waterford Mail* newspaper, given in evidence at the trial. The ground of variance relied on is, the omission by the pleader of the pardon granted by the Lord Lieutenant, which in the newspaper is subjoined to the libellous paragraph. We submit that the whole of the libellous matter is contained in that portion of the article stated in the fifth count of the declaration, and that it is not necessary to set out any other portion of the publication in question, except that part which is alleged to be libellous. The pardon subjoined to the newspaper article is merely a document to which a reference is made, and which, not forming any portion of the libel, cannot be considered as material. The libel as set out in the fifth count is one continuous passage, the sense of which is not altered by the subjoined pardon. It has been held, that the omission of part of a libel is not fatal unless the meaning of that portion set out is thereby varied: *Tabart v. Tipper* (a); *Cartwright v. Wright* (b); *Rutherford v. Evans* (c).

Mr. *Brewster*, Q. C., and Mr. *T. B. C. Smith*, Q. C., *contra*.—The libel states certain proceedings formerly instituted by the plaintiff, whose character, it is said, was open to suspicion, and whose testimony should, therefore, have been received with much caution. The gist of the libel is, that the Lord Lieutenant must have been satisfied of the bad character of the plaintiff before he could grant a free pardon. The climax of the libel was, therefore, the pardon, which furnished evidence of his opinion of the plaintiff's character. And we maintain that the pardon contained matter explanatory of the libel, and material to the sense of it. The true test is, could this passage, as it is set out in the fifth count, be justified?—the fact being, that this document was not a pardon under the great seal, but merely a warrant directed to the Sheriffs of the city of Waterford, and, therefore, being revocable, unlike a pardon under the great seal. If we had justified this warrant as a pardon under the great seal (setting out

(a) 1 Camp. N. P. C. 350.

(b) 5 B. & AL. 615.

(c) 6 Bing. 451.

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the document), this plea would have been demurrable on the ground that the justification could not be sustained *in omnibus*; the order set out in justification not being a pardon under the great seal. Whereas if the entire article were set out in the declaration, the plea of justification might be sustained, by shewing that the pardon under the great seal, as stated in the declaration, had reference to a document which was not a pardon, but such a document as would be sufficient to establish the truth of our plea: *Cartwright v. Wright* (a) is a strong authority for us: *Bell v. Byrne* (b).

Mr. David Lynch in reply.—Two questions are to be considered as arising upon this motion; first, whether there is any omission in the fifth count; and, secondly, if so, whether that omission is material. I contend that there is no omission whatever. The allegation of the plaintiff in the fifth count is, that the defendant made and published a certain libel of and concerning the plaintiff, in his character of prosecutor. I do not undertake to set forth the fact of the pardon, but that the editor (the defendant) having seen the pardon, was thereby induced to write the libel in question. The pardon is stated to be *subjoined* to the newspaper article; and the meaning of the word *subjoin* is, to add after something else; the libel must, therefore, have been completed in that part of the article which precedes the copy of the pardon. In the cases of *Cartwright v. Wright* and *Bell v. Byrne*, cited at the other side, there was a clear variance between the libel, as set forth, and as proved; the fact of Mr. Cobbett in the one case, and the Attorney-General in the other, having spoken the words complained of being material, inasmuch as no justification, if pleaded, could be proved in the words of the declaration. It is assumed at the other side, that the gist of the libel is in the pardon; but it would be a strange doctrine to hold that the Crown could not extend its prerogative without pronouncing a libel on the prosecutor. But, secondly, no variance can be established unless a libel be produced with words varying the sense of the libel declared upon. Even if the pleader undertook to set forth the whole paragraph, he has done so; but the pleader has undertaken only to set forth the libel of and concerning the plaintiff, as contained in the paragraph, *Sydenham v. Man* (c); *Maitland v. Goldney* (d); *Rex v. Brereton* (e).

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BURTON, J.*

His Lordship having stated the facts of the case, the declaration and

(a) 5 B. & Al. 615.

(b) 13 East, 554.

(c) Cro. Jac. 407.

(d) 2 East, 425.

(e) 8 Mod. 330.

* Bushe, C. J., and Perrin, J., were absent during the argument.

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the evidence given at the trial, proceeded as follows.—The variance relied on is, that the pardon is not set out in the declaration. Now, the first question which it is necessary for us to consider, is, whether this pardon is to be considered a part of the document; that is, of the paragraph containing the libellous matter. We are of opinion that it is not a part of that document; it is a separate paragraph, and no more a part of the libellous document, than if it occurred in a subsequent part of the newspaper; and that is a sufficient answer to the first objection, which amounted to this, that the whole of the libellous document was not set forth. The allegation of a variance upon this ground, therefore, has not been sustained, the part omitted not being, in our opinion, any part of the libellous matter, nor of the document containing the libel. In *Wood v. Brown* (a), it was decided that it is not sufficient to set out the substance or purport of the libel, but that the libel itself ought to be set out; and in *Rutherford v. Evans* (b), it was held that “if the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal;” but these cases decide that the party is not entitled to a nonsuit, unless the different paragraphs are portions of the libel. There is another ground upon which this case has been pressed upon the Court, namely; that the paragraph omitted contained matter material to the sense of the libel, and which should, for that reason, have been set out in the declaration; and *Cartwright v. Wright* (c), which is a case of sound doctrine, was relied upon in this part of the argument; in the present instance, it is true, there was contained in the newspaper a document referred to in the paragraph containing the libellous matter, and if that document varied in any material way the sense of the libel, it would, no doubt, entitle the defendant to a nonsuit; but upon referring to it we find nothing in it to vary the libel, and that the sense of the libel could not be affected by it in the slightest degree. Upon these grounds, therefore, the cause must be allowed with costs.

Rule discharged with costs.

(a) 6 Taunt. 169.

(b) 3 Bing. 554.

(d) 5 B. & Al. 615; S. C. 1 Dowl. & R. 230.

1841.
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Michs. Term.
Nov. 25.

SCOTT and WIFE v. MACAULEY.

Where the defendant is prevented by the act of God (a heavy fall of snow) from making the usual affidavit to change the venue, the affidavit in such case may be made by his attorney.

The rule to change the venue was discharged on the usual undertaking by the plaintiff to give material evidence, although the defendant undertook to admit such evidence on the trial.

MR. MACARTNEY moved that the rule to change the venue in this case might be discharged, and the venue retained in the county of the city of Dublin. It had been changed to the county of Donegal, on the affidavit of the defendant's Attorney, which stated that the Attorney knew of his own knowledge that the cause of action, if any, arose in the county of Donegal, and not in the county of the city of Dublin, or elsewhere out of the county of Donegal; and that deponent having arrived in Dublin on the 17th of November, and finding the venue laid in the county of the city of Dublin, he sent down by the post of that night the usual affidavit to be sworn by the defendant; that the return of post was the 20th, but that no reply had been received, owing, as the deponent verily believed, to the irregularity of the mails at present.

Mr. Macartney objected to the affidavit as having been made by the Attorney, and not by the defendant himself; *Tidd's Pr. (a)*. This would be a most dangerous practice; and the more so, since the late rule gives an absolute order in the first instance; *Henderson v. George (b)*. There are no special circumstances shewn as to the defendants being a Corporation or Public Company, or the facts being peculiarly within the Attorney's knowledge; *Walsh v. Murray (c)*. If the defendant is in this country the affidavit should be made by him; *Riddell v. Smith (d)*. The only reason given here is the irregularity of the mails; and it would not be contended that if a badly appointed coach broke down occasionally, that such was a sufficient reason for dispensing with an affidavit by the defendant.

Mr. James Doherty, *contra*, admitted that the general rule in Ireland, as stated by Mr. Macartney, was correct; but the present case was one which, of necessity, should be an exception. The case of *Biddell v. Smith*, and the cases in *Batty's Reports*, shew that an affidavit by the defendant's Attorney is sufficient; and in the present case, owing to the heavy falls of snow, the defendant's affidavit should be dispensed with.

PENNEFATHER, C. J.

We do not see any reason to discharge the rule already made in this case. As a general rule, the affidavit ought to be made by the defendant himself, and not by his Attorney. But there may be exceptions to this

(a) p. 609, 9th ed.

(c) Batt. Rep. 641.

(b) 1 J. & S. 490.

(d) 2 Dowl. P. C. 219.

rule, as where it is plainly impossible to procure the defendant's affidavit, as explained by the affidavit of his Attorney; and here the Attorney swears positively as to the cause of action having arisen in the county of Donegal. It would be unjust to hold that a fatality arising from the act of God should not warrant a deviation from strict rules. I recollect a very peculiar case in the Exchequer in illustration of this principle. A tenant who had six months to redeem, a few days before the expiration of that time prepared to go to his landlord to pay the rent, to prevent the working of the forfeiture; it was, however, the year of the great snow, and the man found it quite impracticable, in consequence, to make the requisite tender; but happening to live close to Lord Guillamore, Chief Baron of the Exchequer, he paid the money to him; and on a bill being filed, the payment was held good by the Court of Exchequer, and afterwards by the House of Lords.

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Mr. *Macartney* then moved to discharge the rule on the usual undertaking.

Mr. *Doherty*.—The action being for false imprisonment and assault committed in the county of Donegal, no material evidence can arise in the county of the city of Dublin; and if there be any such evidence, we are ready to give an undertaking to admit it at the trial; and this Court has decided that such a course is open to us*.

Mr. *Macartney*.—The plaintiffs being husband and wife, and the action for imprisonment of the wife, the marriage of the parties is material evidence, and took place in Dublin; and under the late rule† the practice in this respect is quite settled, and the plaintiff clearly entitled to retain the venue.

Per Curiam.—

Take the rule.

* The case referred to is *Lyndsay v. Glynn and another*, Sm. & B. 205, where the defendant moved to change the venue on the usual affidavit, and the plaintiff sought to retain it on the usual undertaking; the defendant undertook to admit at the trial every thing material that could be given in evidence in the county where the plaintiff had laid the venue, and it was ruled by the Court that the venue in the cause should be changed accordingly.

† 47th New General Rule.—See Yeo's Rules, 71, 72.

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Queen's Bench.

Nov. 12.

ANNE KENNY, in replevin, v. DAVID SIMPSON.

In replevin, the declaration stated that the defendant, on, &c., "in the parish of St. Thomas, in the county of the city of Dublin, in a certain dwelling-house there took the goods," &c. of the plaintiff, and the defendant demurred specially upon the ground that the *locus in quo* was not sufficiently described: *Held*, that the description in the declaration was sufficient.

The defendant applied for leave to plead, but the Court refused the application, holding that that should be the subject of a distinct motion after an argument upon demurrer.

REPLEVIN.—The declaration in this case stated that the defendant "on the 1st of February 1841, in the parish of Saint Thomas, in the county of the city of Dublin, in a certain dwelling-house there, took the goods and chattels of the plaintiff, to wit, one chest, &c., of her, the said plaintiff, of great value, to wit, of the value of £100, and unjustly detained the same."

To this declaration the defendant demurred, and assigned the following causes of special demurrer—"That the said dwelling-house in which the goods and chattels, in the said declaration mentioned, are therein supposed to have been taken, is not designated in the said declaration by name or abutments, or other description, whereby the defendant is prevented from taking any issue upon the plea of taking," &c.

Joinder in demurrer.

Mr. Mackay, in support of the demurrer.—This statement in the declaration of the *locus in quo* is insufficient. It does not inform the defendant in what particular dwelling-house in the parish of St. Thomas he is required to justify the taking. It is obvious that the place in replevin is material; a distress may be perfectly justifiable if made in one particular dwelling-house, and altogether unjustifiable if made in any other. Under this declaration the plaintiff may give evidence of a taking by defendant in any dwelling-house in the parish and not merely an original taking, but he may even shew that after having taken the goods in one dwelling-house, he has had them in any other in the same parish. This is in analogy to the rule in larceny, that where the original taking was wrongful, every subsequent detention is a taking: *Walton v. Kersop* (a); *Maltravers v. Fossett* (b); *Abercrombie v. Parkhurst* (c). In the last case Chambers, J., observes, "When the cattle of one man are taken by another, it is not very easy for the former to ascertain in what place they were taken, and therefore he is allowed to allege that they were taken in whatever place he finds the other in possession of them;" and for this reason, because the plaintiff having every facility, is obliged to name or otherwise particularise the place in the declaration. No new assignment is allowed in replevin; *Cockley v. Palgrave* (d). The defendant then must justify the taking in any house in the parish in which the plaintiff may give evidence of the taking, or plead *cepit in alio loco*, or, as he has done here, demur.

(a) 2 Wils. 354.

(c) 2 Bos. & P. 480.

(b) 3 Wils. 295.

(d) Freem. 238.

But, according to the rules that govern the action of replevin, the defendant has an absolute right to a certain and precise description of the *locus in quo* in the declaration, or for the want of it he is entitled to demur specially: *Ward v. Laville* (a); *Read v. Hawke* (b); *Bullythorpe v. Turner* (c); *Potter v. North* (d); *Potter v. Bradley* (e). In the last case it was decided on special demurrer, that a declaration laying the taking to have been "in the parish of Aldington in the county of Kent, in a certain close there," was insufficient, because there was no inconvenience to the plaintiff in properly designating the close in which, &c., in order that defendant might know where to justify, and also because defendant could not plead *cepit in alio loco*; for if plaintiff could prove that defendant had plaintiff's cattle in a close in the parish of Aldington, he would be entitled to a verdict although the first taking was in another place. That case governs the present. It is impossible to ascribe more certainty to the phrase "a certain dwelling-house" than "a certain close." As to the case of *Pope v. Tilman* (f), where the *locus in quo* being a dwelling-house, was laid as here, and not objected to, there having been a judgment by default, the fault was thereby cured under the statute of *Anne*; at all events, the objection taken having been found sufficient, it was unnecessary to recur to this. Mr. Mackay then cited the declaration in *Butcher v. Towersby* (g), *Walker v. Towersby and others* (h), where the places of taking being dwelling-houses, are described as the dwelling-houses of the plaintiff or A. B.; also *Raymond's Entries* and *Schiffers' Elements of Pleading*, 176, and the precedents in *Chitty*, jun., 479, framed since the New Rules in England of Hilary, 4 W. 4, requiring the *locus in quo* in trespass to be designated by name, abutments, or other sufficient description, thus approximating trespass to replevin in point of certainty: where a dwelling-house, being the *locus in quo*, is stated to be the dwelling-house of the plaintiff (known as No. — in — street), and relied upon the disposition of the Judges of recent times to encourage certain and precise pleading tending to an early and certain issue.

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Messrs. *Armstrong*, Q. C., and *Tudor*, replied.—No case has been cited or can be found in which this objection was brought before the Court; there are some old precedents in favour of it; but all the precedents in the books, for a century, are in the form used in this case; 2 *Chitty's Pl. T. Trespass*; *Woodfull's Landlord and Tenant*, by *Har.* 995; *Petersdorff's Precedents*, 763; *Stephen on Pleading*, 434,

(a) Cro. Eliz. 896.

(c) Willes' R. 476.

(e) 2 M. & P. 78.

(g) Lilly's Entries, 355.

(b) Hob. 16.

(d) 1 Saund. R. 347, note (1).

(f) 1 B. Moo. 386; S. C. 7 Taunt. 642.

(h) Lilly's Entries, 349.

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where he refers to *Dyster v. Battye* (a), in which case Abbott, C. J., said—"It is important to the administration of justice, that the usual "and established forms of pleading should be observed, in order that the "parties to the suit may know with certainty what is the point intended "to be tried, and that the Judge and the Jury may not be perplexed at "*Nisi Prius* by controversy and argument, upon the effect and import "of the issue joined on the record." Less particularity than has been used in this action, has been held good in *Johnson v. Woollyer* (b); and in *Gilbert on Rep.* 256, a form similar to that in the present case is given. No prejudice is done to the defendant, for the generality of the pleading is unfavourable to the plaintiff, and advantageous to the defendant.

Mr. Chambers replied, and contended that the case of *Potter v. Bradley* could not be distinguished from the present, and ought to rule this case; and referred to 2 *Chit. Pl.* 5th ed. 843, note; 8 *Went. Pl.* 142, 144.

BURTON, J., said that *Gilbert on Replevin* was a book of the very highest authority, and the course of precedents appears to sanction the form used in this case.

PENNEFATHER, C. J.

The Court is of opinion that the demurrer in this case ought not to be allowed. The declaration is in the common form, as habitually adopted by a great variety of learned pleaders, and such as has been approved of by Chief Baron Gilbert, who is to be considered no mean authority upon this subject. As has been rightly observed by my Brother Crampton, that if not strictly accurate, the pleading in this case comes within the rule *communis error facit jus*; and at this time of day we are bound to consider it sufficient; and unless an authority has been cited at the other side which is directly in point, we ought not to yield to the objection. Now, although *Potter v. Bradley* decides that the description "close" is not sufficiently particular, yet that case is not an authority to establish that "*dwelling-house*" is not sufficient. It may, perhaps, be difficult to see any sound distinction between these two descriptions, but when it is considered that this case is *inter apices juris*, it is enough to say that the term *close* is not synonymous with *dwelling-house*; and which, therefore, we hold to be sufficient. There is every reason for not yielding to this demurrer; no authority has been cited which ought to coerce us, and no such authority exists—and the defendant will lose nothing by our decision. This is an action of replevin in which there is

(a) 3 B. & Al. 448.

(b) 1 Str. 607.

no new assignment allowed, and the less precision there is upon the part of the plaintiff, the better for the defendant; because if he can justify a taking in any dwelling-house within the parish of St. Thomas, he will discharge the action. We, therefore, think that in point of merits the case is with the plaintiff, and so far as respects injury to the defendant by the form of the declaration, we do not consider that he has sustained any; we follow the modern pleadings and the authority of *Gilbert*, and the series of precedents which have been referred to, in holding that the declaration in this case is not objectionable, or to be objected to by reason of there not being more particularity in the description of the *locus in quo*. Upon these grounds the demurrer must be overruled.

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Demurrer overruled.*

Mr. *Chambers* then applied for leave to amend upon payment of costs, but the Court refused the application, saying that after the argument of a demurrer, a party seeking for liberty to plead should do so by a special application for that purpose.

* The authority of Lord Chief Baron Gilbert was so much relied on in the argument of Counsel, and also in the judgment of the Court in this case, the following passage from that learned Judge's work on Replevin, may not be uninteresting:—

“ In the declaration you must not only allege that the defendant took the beasts in such a place, but you must allege the *locus in quo*, as in *quodam loco ibidem vocat*, &c.; for it is not enough to allege such a place from which the venue may come, but the place must be so *particularly* specified, as to give the avowant an opportunity to shew that he had a right to take the goods in that *particular* place: because the right of caption may turn on the place, and in this action the freehold may come in dispute; and, therefore, it is necessary to specify the place particularly wherein the beasts were taken, which is equivalent to the new assignment in trespass. If the *locus in quo* be not particularly specified in the count, the defendant may demur *specially*, and shew it for cause, for the defendant may justify the taking in that particular place, for causes he could not have any where else.”—*Gilbert's Law of Replevin*, 142.

See, also, *Longfield on Distress and Replevin*, 162, 163.

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Exch. of Pleas.

SITTINGS AFTER MICHAELMAS TERM, 1841.

Before BRADY, Chief Baron.

In re LARKIN, and in several other Cases.

(Exchequer of Pleas.)

Where the Judges differ in opinion upon cases reserved, the opinion of the majority is not conclusively binding on every Judge in all future cases.

The "solvent tenant test" is not the only test to be applied in estimating the value of the property required to confer the elective franchise under the Irish Reform Act, 2 & 3 W. 4, c. 88.

The form of oath prescribed by the 10 G. 4, c. 8, is not the proper

form of oath to be administered to Jurors empanelled on Registry Appeals to try questions of value under the 2 & 3 W. 4, c. 88. The Jurors empanelled on such appeals are to be sworn to try whether the freehold or leasehold in right of which the claimant of the elective franchise seeks to register his vote under the Reform Act, is or is not of the clear yearly value (at which the claimant seeks to register) over and above all rent and charges payable out of the same, except only public or parliamentary taxes, county, parish, or church cesses, or rates or cesses on any townland, or division of any parish or barony wherein the said freehold or leasehold is situated.

THE appellants in these cases claimed to be registered as £10 freeholders of the County of Dublin; but having been rejected by the Chairman of Sessions on the ground of insufficiency of value, they thereupon appealed. A Jury having been empanelled to try the question of value, the Lord Chief Baron, previously to their being sworn, pronounced the following judgment:—

In the cases of Michael Larkin and the other persons who have appealed against the decision of the Chairman of Kilmainham, who rejected their claims to be registered, for want of value, I feel it necessary and right to state the course I intend to pursue in adjudicating upon those appeals, and to declare at length the grounds and reasons for my adoption of that course. I mean to have administered to the jury the same oath which, on the first occasion when the matter came judicially before me, namely, in *re Flood* (a), I considered as that which, under the Reform Act, I had alone authority to administer. That oath is fully stated in the report of the case by Messrs. *Crawford* and *Dix*;* and while I admit that the general tenor of my observations in that case is given by the Reporters with considerable accuracy, I must add, that there are some

(a) 1 Cr. & Dix, C. C. 627.

* The following is the form of the oath there given:—"You and each of you shall well and truly try whether the lands, tenements, or hereditaments, in respect of which J. F. intends to register in the county of Dublin, are or are not of the clear yearly value of £10, over and above all rent and charges payable out of the same, except only public or parliamentary taxes, county, parish, or church cesses, or rates or cesses on any townland, or division of any parish or barony wherein the said freehold is situated, in the said county of Dublin; and a true verdict give according to the evidence.—So help you God."

And see form of oath No. 2, *Alcock Reg. Cas.* p. 56.

expressions used in that report, as forming part of my judgment, for which I do not hold myself responsible.

I should, perhaps, on the present occasion, have contented myself with declaring that I still abided by that decision, and referring to it and to the judgments of Baron Richards in the cases of *Feighney* and *Alcock* for any further expression of opinion, had not one very important question, involved in the course I thus adhere to, been made the subject of a formal declaration of opinion pronounced from the Bench, by a Judge for whose learning and judgment I entertain very high respect—I allude to what Mr. Justice Crampton is reported to have said, when sitting at *Nisi Prius* for my Lord Chief Justice of the Court of Queen's Bench on the 11th of February 1841, after announcing his decision in the case of *Ex parte Smith* (a). That opinion, thus publicly pronounced, appears to have been one formed on much consideration and research; and I think it is now due to the respect I feel for the opinion of that learned Judge, and for those of the other Judges who take the same view of the matter that he does, as well as to my learned Brethren whose opinions concur with mine, and are so strongly canvassed by Mr. Justice Crampton on the occasion I have referred to, and due also to the profession and the public, who are the parties principally concerned and interested in the subject, to state, on this the first occasion on which the question has since come before me in this place, in detail, the principles and reasons which influence my mind in coming to an opposite conclusion from that which the majority of the Judges have arrived at, both as regards the obligation of the Judges in reference to cases reserved, and the test of value by which the elective franchise is to be determined under the Reform Act.

It is proper to observe, that this opinion of Judge Crampton cannot be received as a judicial determination on the question discussed in it. That question was not, in truth, argued or raised on the occasion in *William Smith's* case, or in any other; and even *William Smith's* case, to which the opinion was appended, was not itself a case then brought before the learned Judge in his judicial capacity, as a Judge of *Nisi Prius* in Dublin, from a Court of Registry in the city or county of Dublin, but was a case brought before him nearly a year before, at the Spring Assizes of 1840, held for the county of Tipperary; and on which, therefore, I need scarcely add, the learned Judge had no judicial authority to pronounce judgment, sitting at *Nisi Prius* for the city and county of Dublin. I think it right to say thus much as to the occasion when this opinion was delivered, having regard to the light in which extra-judicial opinions have always been considered in our law; and, without canvassing further the propriety of the opportunity taken for its being pronounced, will address myself to the substantial matters at issue,

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(a) Alc. Reg. Cas., Part 3, 327.

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Each. of Pleas. judgment, rest.

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In adjudicating on appeals from the Registry Courts, the Judges sit under a special jurisdiction given by the statute, by which each Judge is constituted the ultimate judicial authority for the determination of the title of the claimants of the franchise. No further resort is given by appeal, either to the superior Courts of Record, or to any general meeting of the Judges; and the rejection or admission by the Judge below is final to all intents and purposes, save so far as, in the case of admission, a Committee of the House of Commons may have authority to interfere. It is said, however, that although the Legislature has not created any further Court or tribunal of appeal, although, by the whole scope and phraseology of the statute, the immediate decision of the Judge at *Nisi Prius* is contemplated on his own judgment, authority, and responsibility, it is still competent to the assembled body of the Judges, convened in Dublin, by the opinion of a majority, to make determinations and lay down rules on cases, or on questions reserved from the Circuits, which shall conclusively and for ever bind each individual Judge when sitting for the decision of Registry Appeals, whatever may be his own opinion of the justice or legality of those rules or determinations; that he cannot hear any argument, or attend to any reasons to the contrary; and that he is so bound, because it would be against principle, against authority, against usage, and against public convenience, were he to act otherwise.

As in most cases of legal investigation, so in this, the main question is not so much what are the principles of law which may bear upon the point in controversy—as it is, to what extent those principles are applicable to and govern it—upon the principles themselves little controversy generally exists. But in the present case, as in many others, it becomes necessary clearly to understand the full meaning and limits of the principle relied on, before we can safely discuss the question of its application, and, above all, to take care that we have precise ideas of the terms used in the enunciation of it. It is an easy course, but a dangerous one, for the inquirer after truth, to extract particular sentences of the writings of others, and rely on them as evidences of a general abstract proposition, without regarding those connected passages which point the meaning and guide the interpretation of the language employed by the author. Without such regard, the true sense of the passage relied on may be overlooked or misunderstood, and isolated expressions made the basis of a train of reasoning and inference for which no sanction can be found in the authority from which they are selected. In the present case, I think these remarks bear strongly on the argument which has been advanced in support of the first allegation—that it is against principle that a single Judge

should not hold himself bound by the opinions of the majority of his brethren on these cases reserved. The principle which is said to be impugned by this course is, that to establish certainty and uniformity of determination, the rule of law requires that Judges should abide by former precedents when the same points come again in litigation. To this rule I feel unequivocally bound to subscribe; and I should deeply and unfeignedly regret, if in my judicial capacity I were to act so as to countenance the supposition that I felt myself at liberty to depart from it. But it is essential that we understand the true meaning of the rule, the exact limits of its application, and the bounds within which it is controlled; and the first observation I make on this head is, that whatever may be the weight of obligation attaching to the opinions of Judges, that obligation does not belong to them merely as being the opinions of a single Judge, or of any number of Judges, or of those who are styled by Sir W. Blackstone the living oracles and depositories of the law, but mainly and emphatically as being their judicial determinations in their respective Courts of Justice. This is the plain declaration of Sir W. Blackstone himself, in the passage from which Mr. Justice Crampton has quoted the rule; and I cannot do more in supporting the view I take of this subject, and of the true principles of judicial obligations, as I understand them, than to read the language of that very learned and eloquent writer in the place referred to, and out of which the extracts have been made, which is as follows, vol. 1, p. 69:—"But here a very natural and very material question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the Judges in the several Courts of Justice. They are the depositories of the law, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the '*viginti annorum lucubrationes*,' which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the '*præteritorum memoria* [*eventorum*]' reckoned up as one of the chief qualifications of those, who were held to be '*legibus patriæ optime instituti*.' For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not

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"liable to waver with every new Judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more, if it be clearly contrary to the divine law. But even in such cases the subsequent Judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined." Again, in p. 70:—

"The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples: it has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the King or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern Judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice, though the artificial reason of it, drawn from the feudal law, may not be quite obvious to every body. And therefore, though a modern Judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any Court were now to determine that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent Judges would scruple to declare that such a prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the Judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the Judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions of Courts of Justice are the evidence of what is common law:" in the same manner as, in the civil law, what the Emperor had once determined was to serve for a guide for the future. The decisions, therefore, of Courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the

"several Courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the Court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the Judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second, inclusive; and from his time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the Court, at the expense of the Crown, and published *annually*, whence they are known under the denomination of the *year-books*. And it is much to be wished that this beneficial custom had, under proper regulation, been continued to this day; for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose; yet that wise institution was soon neglected, and from the reign of Henry the Eighth to this present time, this task has been executed by many private and contemporary hands; who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination." Again, in page 73, "And thus much for the first ground and chief corner-stone of the laws of England, which is general immemorial custom or common law, from time to time declared in the decisions of the Courts of Justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law."

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Now, who can read these passages without seeing, that in speaking of the obligation of former precedents, the learned writer alludes not to the mere opinions of individual Judges, but to the solemn decisions of the Courts of Justice, made in cases brought judicially before them, and treasured up in the public repositories of their records? To the authority of those decisions we all are bound to defer; and it is in them we find the laws and customs of the land, which it is our duty and our trust faithfully to maintain and expound. It would be a waste of time to quote the various places in which the distinction is taken between such decisions and the opinions of Judges not so judicially given. One example may suffice in illustration of it;—it is in *Vaughan's Reports*, 382; and I refer to it as containing the substance of the paragraphs I have read from Sir W. Blackstone, with the important qualifications to which the rules of judicial obligation in this matter are properly liable:—"It was no Judicial opinion, for Plowden, Bromley Solicitor, two Serjeants, Manwood and Lovelace, are named for it, as well as Dyer and

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"Catlin, who where then Chief Justices of the several Courts, which
 "proves the opinion not only extra-judicial, but not given in any Court.
 "The motive of their opinion was because the warranty was collateral,
 "which is no true reason of the binding, or not, of any warranty. An
 "extra-judicial opinion given in, or out of Court, is no more than the
 "prolatum or saying of him who gives it, nor can be taken for his opinion,
 "unless every thing spoken at pleasure must pass as the speaker's opinion.
 "An opinion given in Court, if not necessary to the judgment given of
 "record, but that it might have been as well given if no such, or a
 "contrary, opinion had been broached, is no judicial opinion, nor more
 "than a gratis dictum. But an opinion, though erroneous, concluding
 "to the judgment, is a judicial opinion, because delivered under the
 "sanction of the Judge's oath, upon deliberation, which assures it is, or
 "was, when delivered, the opinion of the deliverer. Yet if a Court
 "give judgment judicially, another Court is not bound to give like judgment,
 "unless it think that judgment first given was according to law.
 "For any Court may err, else errors in judgment would not be admitted,
 "nor a reversal of them. Therefore, if a judge conceives a judgment
 "given in another Court to be erroneous, he, being sworn to judge according
 "to law, that is, in his own conscience, ought not to give the like
 "judgment; for that were to wrong every man having a like cause, because
 "another was wronged before, much less to follow extra-judicial
 "opinions, unless he believes those opinions are right."

In reference to the latter paragraphs of this reasoning, how often has it occurred, even in the most recent times, that on important questions of law, and the interpretation of statutes, separate Courts, of co-ordinate jurisdiction, have pronounced conflicting decisions, each acting conscientiously on its own views of the law, and adhering to those views, uncontrolled by the opposite determination of the others, until the matter becomes finally settled by the judgment of some superior legal tribunal of appeal? Cases of such conflict of decision still exist; and perhaps this independence of the judicial mind is no where more forcibly expressed than by the very eminent person who not long since filled the seat I have now the honor to occupy—Chief Baron Joy, who in the case of *Roache v. Johnston* (a) thus expresses himself: "As to the principal question in the case;—
 "it has been said by the Counsel for the plaintiff, that if we allowed the
 "objection which has been here made to prevail, we shall be setting the law
 "on this subject afloat. That I deny. The law has already been set afloat
 "by the cases of *Selby v. Eden* and *Fayle v. Bird*,—and it is perfectly
 "competent for us, and it is our duty, to settle that law which we find
 "to be doubtful. We are here called on to follow cases, while we protest
 "against their correctness: and to decide against principle, because

(a) 1 Law Rec. N. S. 100; S. C. Hayes & Jones, 249.

"former decisions have been wrong. I, however, am not one of those who would yield to this argument; but when a case clearly calling for a decision overruling former ones, comes before me, I shall not hesitate to make it." And Baron Smith, in the same case, uses language very much bearing on the question now before us:—"I agree with the opinion of my Lord Chief Baron. If I am put to the alternative, either of overthrowing the decision of two Courts of Law, or of contradicting an Act of Parliament, I must follow the act; and in the present case, I agree most fully with the construction of this act, as given by my Lord Chief Baron."

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The force of these considerations must have been felt by those who insist on the paramount obligations of the opinions of the Judges; and accordingly, as shewing that this matter is concluded by authority, it is contended, in the argument of my Brother Crampton, that the assembly of the Judges in cases reserved is in fact a Court. He states it to be a Court for the final determination of questions of general interest and particular difficulty—not a Court to originate proceedings, not a Court of appeal—not a Court to pronounce or to execute judgment, but a Court of consultation,—whose resolutions, he says, are as binding on the members of that Court as the judgments of the Exchequer Chamber are on the individual Judges of the Law Courts;—and, by necessary consequence, if binding on the Judges, they must be binding on all the Queen's subjects, as part of the law of the land. I have not found in any legal authority this phrase of "a Court of Consultation" any where used as contradistinguished from the ordinary Courts of Justice; and I think we should pause and well consider the matter before we introduce an expression of such novelty, and, I must say, of apparent contradiction in terms,—and that we may better judge of the soundness of the position which thus assigns to the meetings of the Judges, in cases reserved, the station of a Court, and of the authorities called in aid of that position, let us first see what is the nature of those meetings, and the course of proceeding therein. They are, then, meetings convened on the summons of the Lord Chief Justice of the Court of Queen's Bench, as the senior Judge, not at any fixed or stated periods, but at intervals, as occasion may require. They are held in a private chamber, to which the public, the profession, and the parties interested in the case have no privilege of entrance. Until very recently, namely, in Hilary Term 1826 (a), Counsel were not heard before them; but by a regulation then come to, it was agreed that Counsel should be heard as in England, if the Judge who reserved the case thinks it of a nature that Counsel should argue it; and it is then generally argued only by one Counsel on each side. There is no record of the proceedings kept,

(a) See Jebb's Reserved Cases, p. 1.

M. T. 1841. to which the public can resort for information: there is no office or
Each. of Pleas. officer belonging or attached to the assembly; no public judgment or
In re opinion is announced, nor are any reasons stated to the public for the
LARKIN. opinion arrived at; and it is only within the present year that any publication of the cases so reserved and decided, issued from the press.

It is, however, contended upon authority, that an assembly so constituted is a Court—is, in truth, one of those Courts of Justice whose determinations all Judges are bound to abide by as implicitly as those of any other Court of Error or Appeal; and the opinion pronounced by Judge Crampton, already referred to, expressly amounts to this, that the assembly of the Judges in this manner is the ancient Court of Exchequer Chamber, of which such frequent mention is made in our law.

With the greatest possible respect for the opinion of that learned Judge, I think the authorities he has referred to demonstrate the contrary; and they shew to my mind that the ancient Court of Exchequer Chamber of which he speaks, resembled in nothing these modern Chamber assemblies of the Judges, except that it was composed of the same judicial personages. Those authorities, with others I shall refer to, establish, in my judgment, that those assemblies were always distinct from that Court, and are so regarded by all our legal writers. Until the present controversy arose, no attempt appears to have been made to confound the assembly of the Judges in cases reserved, with that ancient Court. They are no where spoken of by any Judge or legal authority as identical. We have to this day the meetings of the Judges both in England and in Ireland of the one class: we have not a syllable in any recorded instance for the last hundred years, of a sitting of the other. In short, there has not been for a century a single case reported as being adjourned into the Exchequer Chamber, while our books of Crown Law abound with decisions on cases reserved. In reference to the Court of Exchequer Chamber as an assembly of all the Judges, to which cases were adjourned from the other Courts of Westminster Hall, nothing can be more precise or satisfactory than the information we have from the old Reporters: they shew it to have been an open public Court, accustomed, and, I may say, bound, as the other Courts were, to hear the cases brought before it argued and discussed by Counsel, and to give to the public in open Court the grounds and reasons of every decision. Thus in the Preface to the 7th Reports, Sir Edward Coke, alluding to Calvin's case, says, "The case of the Postnati, I confess, is longer than any of the rest, and that for three causes:—first, for that it was an Exchequer Chamber case, for deciding whereof all the Judges of England (as the law doth require) did argue openly, and at large. Secondly, for that never any case within man's memory was argued by so many Judges in the Exchequer Chamber as this was, there having argued "the Lord Chancellor and fourteen Judges."

In the Report, p. 2, he says—"After this case had been argued in the Court of King's Bench, at the Bar, by the Counsel learned of either party, the Judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the laws) into the Exchequer Chamber, to be argued openly there; first, by the Counsel learned of either party, and then by all the Judges of England, where afterwards the case was argued by Bacon, Solicitor-General, on the part of the plaintiff, and by Laurence Hide, for the defendant; and afterwards by Hobart, Attorney-General, for the plaintiff, and by Serjeant Hutton, for the defendant; and in Easter Term last, the case was argued by Heron, puisne Baron of the Exchequer, and Foster, puisne Judge of the Court of Common Pleas; and on the second day appointed for this case, by Crooke, puisne Judge of the King's Bench, and Altham, Baron of the Exchequer; the third day by Snigge, Baron of the Exchequer, and Williams, one of the Judges of the King's Bench; the fourth day by Daniel, one of the Judges of the Court of Common Pleas, and by Yelverton, one of the Judges of the King's Bench; and in Trinity Term following, by Warburton, one of the Judges of the Common Pleas, and Fenner, one of the Judges of the King's Bench; and after by Walmesley, one of the Judges of the Common Pleas, and Tanfield, Chief Baron; and, at two several days in the same Term, Coke, Chief Justice of the Common Pleas, Fleming, Chief Justice of the King's Bench, and Sir Thomas Egerton, Lord Ellesmere, Lord Chancellor of England, argued the case (the like plea in disability of Robert Calvin's person being pleaded *mutatis mutandis* in the Chancery, in a suit there for evidence concerning lands of inheritance; and by the Lord Chancellor, adjourned also into the Exchequer Chamber, to the end, that one rule might overrule both the said cases)." And in p. 28, after the passage quoted by my Brother Crampton, that never was any case adjudged in the Exchequer Chamber with greater concordance and less variety of opinions, the Lord Chancellor and twelve of the Judges concurring in one opinion, it is added, "That there was not in any remembrance so honorable, great, and intelligent an auditory at the hearing of the arguments of any Exchequer Chamber case as was at the case now adjudged." In *Capel's case* (a) the Judges were unanimous, and the reasons were delivered by the Judges of the Common Pleas, but the case was argued in the Exchequer Chamber before all the Justices of England. So in *Shelley's case* (b), the case was argued before the Chancellor and all the Judges; and in *Chudleigh's case* (c), it is stated that because the case was difficult and of great consequence and

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(a) 1 Rep. 120.

(b) 1 Rep. 102.

(c) 1 Rep. 121.

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importance, it was thought necessary that all the Justices of England should *openly*, in the Exchequer Chamber, upon solemn argument, shew their opinions in this case.

Now, in all these cases I find the same form of proceeding adopted, the same language employed to designate the Court, the same important particulars observed in the hearing and decision of the case at issue. I find, in short, a public Court, hearing a public argument, and openly giving to the country at large the reasons of that judgment which was to bind the public rights. And so it was in the great *Ship Money* case, the case of *Hampden* (a). That case was adjourned into the Exchequer Chamber from the Court of Exchequer; it was there argued *openly and at large*, and the several Judges gave to the public the reasons of their judgments. So that whatever else may be thought of that case, it was at all events not in these respects a departure from the ancient course of public discussion.

In *Co. Lit.* 58, a, and in the preface to his Fourth Institute, we have this definition of a Court:—"Curia—Court—is a place where justice is "judicially administered, and is derived *a cura, quia in curiis publicis "curas gerebant*;" and in very emphatic language, in the same great Commentator's reading on the Statute of Marlebridge (b), we have these remarkable expressions in illustration of the words in *Curia Domini Regis*, in the first chapter of that statute:—"These words are of great importance; for all causes ought to be heard, ordered, and determined before "the Judges of the King's Courts openly in the King's Courts, whither "all persons may resort; and in no Chambers, or other private places: "for the Judges are not Judges of Chambers, but of Courts; and, "therefore, in open Court, where the parties, Counsel and Attorneys "attend, ought orders, rules, awards, and judgments, to be made and "given, and not in Chambers or other private places, where a man may "lose his cause, or receive great prejudice or delay in his absence, for "want of defence. Nay, that Judge that ordereth or ruleth a cause "in his Chamber, though his order or rule be just, yet offendeth he the "law, (as here it appeareth) because he doth it not in Court. And the "opinion is good, and agreeable to this law—*qui aliquid statuerit parte "inauditâ alterâ, æquum licet statuerit, haud æquus fuerit*: neither are "causes to be heard upon petitions, or suggestions and references, but in "*Curia Domini Regis*."

This Court of Exchequer Chamber, so described, has, I need scarcely say, had no existence as such in modern times. Why, or how it gradually became obsolete it is not very material to inquire; but this is certain, that, as I have already said, there is not for more than a century past a single

(a) 3 How. State Trials, 826.

(b) 2 Inst. 103.

instance of the ancient practice of adjournment of a case from any of the Superior Courts of Common Law into it. I will afterwards advert to the probable origin of this phrase *adjournment*, but for the present I will merely say, that even in the most recent instance in which one of the Superior Courts of Westminster Hall consulted their Brother Judges on a case before it, namely, the case of *Smith v. Richardson*, reported in *Willes* (a), there is no mention of the case being adjourned into the Exchequer Chamber, but merely that the Court desired the opinion of the rest of the Judges, and there was no open argument before the assembled body. And this is the last instance of the practice as regards any of the Superior Courts in England—while many have been the cases of new and important questions of doubtful and difficult points brought before them, and on which they have not unfrequently, and for years, conflicted in opinion—but for the solution of which none of those Courts appears ever to have thought of reviving the obsolete and anomalous tribunal of the Court of Exchequer Chamber for the assembly of all the Judges of England on matters of law.

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But whatever be the origin, the nature, or the fate of this ancient tribunal, I think it is perfectly clear that the meetings of the Judges of England in criminal cases, which are those only so dealt with by them, had no common origin with that Court, or connexion with it.

Before I leave this part of the case, it is not, I think, unimportant to observe that it may well be doubted if in Ireland this Court of Exchequer Chamber ever existed at all. My Brother Crampton has in support of his argument, among other writers, referred to *Sullivan's Lectures*, a work of great merit, and well worthy the careful perusal of every legal student. The passage referred to is in page 318, 2nd edition of that work printed in London in 1776, and it is in these words "There is another Court of "Exchequer Chamber in England, although we have none such in this "kingdom" (i. e. in Ireland), erected 27th *Eliz.* and composed of the "Judges of the Common Pleas and Barons of the Exchequer, in which "lies a writ of error from the King's Bench, to reverse judgments in "certain suits commenced there originally. Into this court are frequently "removed, or adjourned from any of the other Courts, causes that are "of a new impression, and attended with difficulty, or even such con- "cerning which the Judges, perhaps, entertain no great doubts, but are "new, and attended with extensive consequences; and this, for the more "solemn determination, that all the Judges of all the Courts might be "consulted about establishing a new precedent. Anciently such causes "were adjourned into Parliament, but the legislative business of that high "Court increasing, this Court was substituted for the above purpose of "consultation."

(a) p. 20.

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Now, in this passage, the learned author is certainly incorrect as to the ancient English Court of Exchequer Chamber about which I have been speaking, because it plainly was not the Court created by the 27 *Eliz.* ; but it is equally apparent that he speaks of this Court for the adjournment of causes from the other Courts, as one not in fact existing in Ireland.

The only Court of Exchequer Chamber which sat in this country until the present Court was established by the 40 *G. 3*, c. 39, was that created by the 31 *Ed. 3*, c. 12, which only applied to writs of error from the Court of Exchequer. Writs of error from the other Courts lay only to the Court of King's Bench in England, until by the 21st and 22nd *G. 3*, c. 49, they were made returnable into the Parliament of Ireland ; and there is a statute respecting the room in which the Court of Exchequer Chamber was holden here, which describes the uses to which it was put, and says nothing of any meetings of all the Judges, such as were holden in the Exchequer Chamber in England. By the 31 *Ed. 3*, c. 12, it is enacted, " That on complaint in error in the Exchequer, the Lord Chancellor and Lord Treasurer shall cause to come before them in any Chamber " of Council nigh the Exchequer, the record and process of the Exchequer, " and taking to them such Justices, &c., as shall be thought meet, shall " hear and determine such errors." This was the only Court of Exchequer Chamber in Ireland, and the statute I have alluded to as relating to the room in which it was holden, is the 13 *G. 2*, c. 9, s. 4, which describes it as the room commonly called the Exchequer Chamber—" where " formerly the Court for hearing and determining of errors in the Court " of Exchequer, the Courts of Delegates and the Commissioners of " appeals *usually sat*."—Nothing about meetings of the twelve Judges. They never did so sit in Ireland, because the writs of error went to England.

The only Court of Exchequer Chamber now existing, is that established by the 40 *G. 3*, c. 39, which declares it shall not be lawful to sue forth any writ of error to the Court now holden before the Chancellor or Treasurer, *commonly called the Exchequer Chamber*. Section 2 provides that writs of error are to be brought before the Twelve Judges, " into a Chamber to be appointed by the Chief Governor of Ireland *for " that purpose*, and to be called the *Exchequer Chamber* ;" and that the Chief Justices, &c., may examine such judgment, &c.

I have merely alluded to this part of the case, which is, perhaps, one more of curiosity than of substance, but still is, I think, not without some weight in the present discussion ; and I revert to the consideration of the real character of those meetings of the Judges of England, on cases reserved, on which the argument mainly rests.

That such meetings are not of modern origin, but have been in practice for many years, I do not dispute ; but they have always existed, as they now exist, as assemblies for the purpose of advice and consultation in cri-

iminal cases, and not as Courts in any legal sense of that word, and as such they are uniformly described in our books. The peculiarities of the English criminal code, as it stood for many centuries, and as it partly still exists—the exclusion of any aid from Counsel for the prisoner—the obligation thus cast on the Judge of watching his interests, and seeing that he should have the full benefit of the law; and the absence of any ordinary means of granting a new trial, rendered it peculiarly desirable that the Judges should have some easy method of assisting each other in their advice on the questions thus arising before them; and accordingly, for this purpose, they were accustomed to meet and assemble themselves together for the benefit of their mutual assistance and advice; but I no where find their meetings called meetings of the Exchequer Chamber—I no where find mention made of a case being adjourned into the meeting—I no where find the significant term *Court* applied to them—I no where find it stated that cases were at those meetings argued openly and at large. Further, these meetings were not confined to deliberations on cases which had arisen and waited for judgment; they were frequently occupied in settling the course of intended trials, and resolving beforehand how such and such points should be ruled if raised thereon. How far this was a proper and constitutional course of proceeding may well be doubted; but the fact is unquestionable; and for proof of it and of the general character of those meetings, I refer to the very full reports of several of them which are to be found in *Kelyng's Reports*. That book commences with a meeting of the Judges at Serjeant's Inn, where they were attended by the Attorney and Solicitor-General, and other Counsel for the Crown, who actually consulted the Judges as to the course of proceeding to be taken against the regicides; and then follow, accordingly, thirteen resolutions of the assembled Judges on various matters which appertained to those trials. In page 19, we find that the two Chief Justices alone met, and, with the aid of the Attorney and Solicitor-General, and the Reporter, agreed on several other resolutions as to trials to be had in York.

In page 31, a meeting of the Judges is mentioned, when certain questions are stated to have been propounded to them, and agreed.

Again, in page 53, we have a meeting of all the Judges of England at Serjeant's Inn, to consider of such things as might in point of law fall out on the trial of the Lord Morley; and one of the resolutions come to on that occasion deserves notice, as shewing the opinion of the Judges of that time as to the essential requisite of publicity, as connected with judicial resolutions—"It was resolved, that in case the Peers who are triers, "after the evidence given and the prisoner withdrawn, and they gone to "consult of their verdict, should desire to speak with any of the Judges "to have their opinion upon any point of law, that if the Lord Steward "spoke to us to go, we should go to them; but when the Lords asked

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"us any question, we should not deliver any opinion, but let them know
 "we were not to deliver any private opinion without conference with the
 "rest of the Judges, and that to be done openly in Court: and this,
 "notwithstanding the precedent in the case of the Earl of Castlehaven,
 "was thought prudent in regard of ourselves, as well as for the avoiding
 "suspicion, which might grow by private opinions, all resolutions of
 "Judges being always done in public."

In page 56, a report is given of a like prospective meeting and resolutions by the Judges in *Lord Dacre's case*, in the 26 *Hen. 8*.

In page 59, we have a meeting of the Judges, at which they were called on to give their opinions on a special verdict; and the account of this meeting is important, as shewing the true nature of these assemblies. It appears, that after the special verdict had been sent to the Judges, the question was, whether the case was one of murder or manslaughter. The Judges differed in opinion: eight of them declared that, as then advised, it was only manslaughter; but declared they would not be bound by that opinion, having had the notes of the special verdict three days before. The other four Judges were of opinion it was murder;—but, in page 62, we find this memorandum:—"After this difference, I
 "granted a *certiorari* to remove the case into the King's Bench, to be
 "argued there, and to receive a *final and legal* determination." And all the Judges there were clearly of opinion it was murder. Now, if this meeting of the Judges had been a Court of Justice competent to pronounce a final and legal determination, why was not the case adjourned to another day, to give the eight Judges time to consider further of it, and so decide the case? why should those Judges have been at liberty to say they would not be bound by the opinions they then gave, if those opinions were expected to be judicial opinions conducing to the judgment? Why, above all, should it be said that the case was removed into the Court of King's Bench, where it was only before four of the Judges, to receive a final and legal determination, if it were already, as contended, attached in a Court composed of the whole Twelve Judges of England? It appears to me that this is a strong exemplification of the true character of these meetings, that they were mere assemblies for consultation and advice, and nothing more. Sometimes it would appear that the Judge who wished for this advice sought only that of some few of his brethren, and not of the whole body. Instances of this are in the same book, pp. 64, 66.

In page 72, there is a remarkable case, that of *Messenger* and others for high treason, and *Kelyng* says, that he resolved that the Jury should find the matter specially, and then he would procure a meeting of all the Judges of England; and what was done should be by their opinion, that so the question might have such a resolution as no person afterwards should have reason to doubt the law; and thereupon a special

verdict was found, and the Judges met to consider it at the Chief Justice's Chamber. This is the case where a rising with intent to pull down all bawdy-houses was held to be a levying war against the King, and high treason; and if there is one case more than another in the books, the law of which is doubted, it is this very case. Lord Hale was the only dissentient Judge, and he re-states his doubts upon the law as then resolved, in the first volume of the *Pleas of the Crown*, p. 132.

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I will hereafter notice this case as to the conduct of Lord Hale, but I shall here merely refer to the opinion of a very able writer on this very case, *Luder's Considerations on the Law of High Treason*. He says, "Such a decision ought not to have outlived its generation. It will not bear the scrutiny of cool reflection, and is unworthy of appearing as a precedent under that happy administration of justice which we have enjoyed since the Revolution, and more especially under the government of the House of Hanover, which that glorious event procured to us. It is fit only for the Star-Chamber, and such Ministries and Magistrates as a race of Tudors and Stuarts would employ to pervert the laws" (a).

Thus I find no other description in these reports of the meetings of the Judges than as meetings or assemblies to consult together; and nowhere in this or any other Reports do I find such an assembly stated to be a Court. The Judges met together as advisers and assessors to those who sought their assistance and opinion; but the judgment was always that of the Court before which the case was legally depending; and so the matter is expressly stated in the clearest terms by Parke, J., in the case of *The King v. Parry* (b), "We cannot grant a *venire de novo*, because we are not a Court of Justice; we are merely advising the learned Judge who tried the case." Alderson, B., says, "When a civil case was argued before the Twelve Judges, the eight sat as assessors to the four Judges of the Court in which the record was, and the four gave judgment." Tindal, C. J., adds, "You can argue the case, and we can advise the learned Judge what ought to be done."

Having thus endeavoured to clear the case of this notion, in my opinion, unsupported by principle or authority—that the meeting of the Judges on reserved cases is the ancient Court of Exchequer Chamber, or is a Court at all, in the legal sense of the word, and shew that it is no more than an assembly for consultation and advice,—I will proceed to consider how far, on authority and usage, each individual Judge is constrained to hold himself in all future cases bound by the opinion of the majority of his brethren thus assembled.

My Brother Crampton has not cited any judicial authority in support of his view of this question; all the references made by him are to cases

(a) See How. St. Tr. 910.

(b) 7 Car. & Payne, 841.

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before the Court of Exchequer Chamber, with the exception, perhaps, of *Frost's Case* and the case of *Smith v. Richardson*, which I shall notice by-and-bye; but he has referred generally to the case of *Rex v. Hampden (a)*, which is more fully dwelt upon by the Reporter in a note to Judge Crampton's opinion. Now, I may admit that in that case the doctrine is very clearly pronounced, that the Court below, *i. e.*, the Court from which the case has been adjourned into the Exchequer Chamber, was bound to give judgment according to the resolutions of all the Judges; and I cannot deny that in all the reports of arguments in that Court of Exchequer Chamber, this appears to have been the rule. I will not stop to comment on the *Ship Money* case itself, the whole proceedings in which were afterwards annulled by act of Parliament; but I think, on looking more narrowly into the nature of this Court of Exchequer Chamber, it will be found to have been always something more than a mere Court of consultation, as it is called; and that the Judges there assembled did exercise the functions of a Court of Justice—functions which required, as in practice was the case, that all its proceedings should be open and public to the world.

In *Comyn's Digest*, tit. *Courts*, D. 5, it is said, quoting *Co. Lit.* 71, b, "If the Court of B. R. or C. B. be equally divided, or apprehend great difficulty in the case, it may be adjourned into the Exchequer Chamber, to be argued by all the Justices of England; and this was by the statute 14 Ed. 3, c. 5, for before it was determined by Parliament."

On referring to *Co. Lit.*, in the passage quoted, I find it thus stated:—"And if the Court be equally divided, or conceive great doubt of the case, then may they adjourn it into the Exchequer Chamber, where the case shall be argued by all the Judges of England; where if the Judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next Parliament by a Prelate, two Earls, and two Barons, which shall have power and commission of the King in that behalf, and by advice of themselves, the Chancellor, Treasurer, the Justices of the one Bench and the other, and other of the King's Council, as many and such as shall seem convenient, shall make a good judgment, &c. And if the difficulty be so great as they cannot determine it, then it shall be determined by the Lords in the Upper House of Parliament. See the statute, for it extends not only to the case above said, but also where judgments are delayed in the Chancery, King's Bench, Common Bench, and the Exchequer, the Justices assigned, and other Justices of Oyer and Terminer, sometime by difficulty, sometime by divers opinions of Justices, and sometime for other causes. Before which statute, if judgments were given by reason of difficulty, the doubt was decided at the next Parliament (which there was to be holden once every year at the least)."

(a) 3 How. State Trials, 1314.

It appears from this, that by the statute of *Ed. 4(a)*, a tribunal was constituted from which the case was to be further adjourned from the Exchequer Chamber: and although that tribunal, with the Court itself, have been long obsolete, I think the language of the statute throws great light as well on its functions, as on those of the Exchequer Chamber, for which it was in cases of continuing difficulty, then to be substituted, according to Sir E. Coke. The statute is headed thus:—"Delays of judgments in other Courts shall be redressed in Parliament;" and after reciting that mischiefs had arisen in the Chancery, King's Bench, and other Courts, by judgments being delayed, from difficulties and divers opinions of the Judges, it enacts that at every Parliament there shall be chosen a Prelate, two Earls and two Barons, with commission to hear complaints of delays of justice, and shall have power to cause the tenor of the records and processes so delayed, and the Judges to hear the cause and reason of the delay; "which cause and reason so heard, by "good advice of themselves, the Chancellor, Treasurer, the Justices of the "one Bench and of the other, and other of the King's Council, as many "and such as they shall think convenient, shall proceed to take a good "accord and make a good judgment; and according to the same accord "so taken, the tenor of the said record, together with the judgment which "shall be accorded, shall be remanded before the Justices, before whom "the plea did depend, and that they hastily go to give judgment according to the same record; and in case it seemeth to them that the "difficulty be so great, that it may not well be determined without "assent of the Parliament, that the said tenor or tenors shall be brought "by the said Prelate, Earls and Barons, unto the next Parliament, and "there shall be a final accord taken, what judgment ought to be given in "this case; and according to this accord it shall be commanded to the "Judges before whom the plea did depend, that they shall proceed to "give judgment without delay."

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Now, there certainly is a great analogy between the course prescribed in this statute and the practice of adjournment into the Exchequer Chamber, as described by Lord Coke and the other authorities. The tribunal is not itself to give judgment, but is to take a good accord, i. e., to agree what judgment should be given, and the case is then remanded back to the Court below, who must give their judgment accordingly. This shews that the ancient Court of Exchequer Chamber was more than a Court of mere advising and consultation; that it was, in truth, put in place of the Parliament itself, and had authority to direct what judgment should be given in the Court below; and, therefore, as to the class of cases thus brought by adjournment into that Court, and there argued openly and at large, as described in our books, I do not think it can

(a) 14 Ed. 4, c. 5.

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well be controverted that the judgment of the Exchequer Chamber was binding on the Court from which the case was so adjourned.

But, as I have already shewn, we are not here dealing with this ancient Court; we are dealing with an assembly whose only jurisdiction is to advise and assist the Judge who submits a question to their consideration, and we have to look to the principles which in practice and authority apply to that species of tribunal; and I will proceed to notice the several cases which have occurred to me in my researches on the subject, as illustrating the matter, and as establishing in my mind that it is still open to a Judge, who dissents from the opinion of the majority given on such occasions of consultation, to abide by and act in future cases, on his own opinion. I say in future cases, because I am not contending, though there are grounds on which I might contend, that in the particular case submitted, the Judge who desires the advice of his brethren ought not, against his own opinion, to abide by the advice given, and act thereupon in that particular case accordingly. The decision in *Pross's* case goes no farther than that; and it is not very clear to my mind that Lord Denman's letter to the Chief Justice Bushe means any thing more. With regard to the case of *Smith v. Richardson*, so much relied on;—the resolution there was no more than the establishing a rule of practice as to a point of pleading and evidence; and it was quite fit that, in such a matter, the rule once resolved on should be adhered to in all cases. But I will now proceed to the authorities.

In that case of *Messenger* and others^(a), before noticed, the Judges having met, proceeded first to discuss the general question as to the doctrine of treason: and, having come to a resolution on that, they then proceeded to rule each case separately, according as the facts of it brought the party within the general rule or not; and on that general question Chief Baron Hale delivered his opinion, that it was not treason—in which he stood alone; and, in the words of the report, all the rest of the Judges did unanimously agree that the rising in question was a levying war, and was high treason. The report then states (p. 77), that “After this resolution in general we went to consider the particular cases “as they were found upon the several special verdicts.” And one would suppose, that according to what is contended for at the present day, there having been such a resolution of all the other Judges against him, Lord Hale thereupon submitted thereto as the law, and changed his own opinion; but, on the contrary, we find he still adhered to it, and acted on that opinion: for the Reporter goes on to say, “It was agreed by all “of us, except the Chief Baron, who said he doubted on the main “that as to *Messenger* and *Basely* in the first verdict, and to *Cotton* in “the second special verdict; and as to *Lymerick* in the fourth special

(a) Kel. 74.

"verdict, that the matter as it was found against these four, was high treason in them all, and accordingly they had judgment, and were executed. But as to Appletree in the first special verdict; and as to Lattimer in the third special verdict, there was difference in opinion amongst us, whether the verdict was sufficiently found against them to judge it high treason or not. For besides the Chief Baron who was against all, my Brother Atkins, Tyrell, Windham, and Wyld, held that the verdict was not sufficient against those two for to give judgment that they were guilty of treason, because they said it was not expressly found that they were aiding and assisting: but myself, Brother Turner, Twisden, Archer, Raynsford, and Moreton, thought the verdict as it was found against them to be as full and plain as any of the rest."

And, as I have said before, Lord Hale, in his treatise of the *Pleas of the Crown*, re-states his doubts, and pretty plainly intimates that his doubts still remained, although he adds, that the opinion of the majority prevailed, as was fit; and as no doubt it was in the particular case, whatever may be thought of the soundness of it. In the case of *Armstrong v. Lisle* (a), a case of a plea to an appeal of murder, argued before the King's Bench,—after stating that divers cases had been resolved by all the Judges of England to a certain effect, it is added—"But notwithstanding what had been so practised, and afterwards so solemnly resolved, we (*i. e.*, the Court of King's Bench) did, upon the reasons before mentioned, resolve that the defendant's plea to the appeal was a good bar, and gave judgment for the defendant." Here we have the Court of King's Bench setting aside these judicial resolutions upon their own reasons.

I next come to a case of great importance, in which almost the identical question now at issue was discussed and decided in the most solemn manner.¹ I have already stated that the act of the 31 *Ed.* 3, c. 12, which constituted the Court of Error before the Chancellor and Lord Treasurer for errors from the Court of Exchequer. That statute empowers those high Officers to take to them the Justices and other sage persons, such as seemeth to them to be taken. This was, as I have said, the only Court of Exchequer Chamber in Ireland, for a long period, and it was a Court in use also in England; and in the famous case, in the reign of King William, called the *Banker's* case, reported 14 *How. State Trials* (b), a writ of error was brought into it from the Court of Exchequer, before Lord Sommers, the Lord Keeper, there being then no Lord Treasurer, and he called the Judges to his assistance—who, by a large majority, gave their opinions that the judgment of the Exchequer should be affirmed; but Lord Sommers being of a contrary opinion, it is stated that the following question was referred to the Judges:—"Whether, as this Court is constituted, judgment ought

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(a) Kelyng, 106.

(b) p. 105.

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“to be given according to the opinion of the greater number of the Judges, who are called by the Lord Chancellor and Lord Treasurer to their assistance, notwithstanding they themselves are of ‘a different opinion?’ Afterwards, on Tuesday November 24, 1696, the Lord Keeper came again into the Exchequer Chamber, and declared that he had received a paper from the Lord Chief Justice Holt, containing the opinion of the Judges upon the question referred to them: and that three Judges were of opinion ‘That the Lord Keeper was bound to give judgment in these cases, according to the ‘opinions of the majority of the Judges by him called to his assistance:’ but that seven Judges were of opinion ‘That he was not ‘bound by such majority of opinions, but was at liberty to give judgment according to his own:’ and declared ‘That as to this question, ‘he himself concurred in opinion with the seven Judges.’ And accordingly pronounced judgment ‘That the judgments given in these cases ‘by the Court of Exchequer, be reversed.’”

Now, it is important to note, in the terms of the question in that case, the words “as this Court is constituted,” plainly referring to the fact that the Judges were not necessarily constituent members of the Court, but were merely called on for assistance and advice by the Lord Keeper and the Treasurer.

In the equally important and remarkable case of *Ashby v. White* (a), in the reign of Queen Anne, a branch of which consisted of an application to the Court of Queen’s Bench for a *habeas corpus* by some of the parties who were committed by the House of Commons, that Court desired the assistance of the rest of the Judges, upon the application for their discharge, and they all were of opinion, except Lord Chief Justice Holt, that they ought to be remanded. It was, however, argued in the Queen’s Bench by Counsel, and the Judges of that Court afterwards delivered their opinions *seriatim*—a course plainly shewing that nothing was considered as concluded by the advice of the Judges; and Lord Holt continued to retain his own opinion; but his three brethren being of a different one, the prisoners were remanded. Lord Holt there says (p. 858), “That he owned himself to lie under two disadvantages; one, that all the rest of the Judges do agree with his three Brethren, from whom he had the misfortune to dissent. The other, that he opposed the votes of the House of Commons; and did begin to think he might justify himself in resigning his opinion to the rest; but that he valued more the dictates of his own conscience, than any thing he could suffer in this world, and by that and his judgment (though it were but weak) he was to be guided.”

I will now refer to an observation of that eminent crown lawyer, Sir

(a) 14 How. State Trials, 695.

Wm. Foster, in his book on Crown Law, first published in 1762, which, I think, shews what his opinion was as to the coercive authority of the meetings of the Judges, which he calls conferences. Speaking of the case of *The Queen v. Tooty and others*, in page 138 of that work, he says:—"I must confess that the circumstance of a mutual combat was wanting in the case of *The Queen v. Tooty and others*, which was likewise mentioned on this occasion; but that case (I speak it with great deference) standeth, as I conceive, on no better grounds than the opinion of seven learned Judges against five." Why, according to the argument I am contending with, it could not stand on higher grounds than that—a decision of a majority of the Judges assembled for the consideration of the case.

Another case of great notoriety—the case of *Entick v. Carrington*(a), which occurred in the year 1765—furnishes us with a very remarkable instance of the true estimation in which the opinions of the Judges assembled to advise on criminal questions ought to be held—as great and revered authorities, no doubt, but still open to inquiry and investigation into the principles on which they are founded. In that case Lord Camden, a venerable and constitutional authority, discussing the doctrine of general warrants, proceeds to quote the resolution of the Judges, as stated by Scroggs, C. J., in the case of the trial of *Harris* for a libel, and proceeds—"Then Scroggs takes up the subject, and says, the words I remember are these,—when by the King's command we were to give in our opinion, what was to be done in point of regulation of the press, we did all subscribe that to print or publish any news-books or pamphlets, or any news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose, now, that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicité* done, and the author ought to be convicted for it.—These are the opinions of all the Twelve Judges of England; a great and revered authority. Can the Twelve Judges extra-judicially make a thing law to bind the kingdom by a declaration, that such is their opinion? I say no. It is a matter of impeachment for any Judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the Judge that subscribed it. Out of this doctrine sprang the famous general search-warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the Twelve Judges that subscribed the opinion."

There is little to be found on this subject in the modern books; and

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(a) 19 How. St. Trials, 1071.

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after what I have quoted, it may seem almost to derogate from those high authorities to notice the few references I am still able to make on this subject. But it is my duty to pursue it, and to place before the public all the authorities and reasons which influence my judgment.

In our Irish Reports, in the case of *Rankin v. Newsom* (a), Mr. Justice Jebb, a most cautious and learned Judge, is reported to have said on a case ruled by the Twelve Judges, being cited to the Court:—"With respect to that decision there certainly was a difference of opinion among the Judges; it was not argued by Counsel, and I have no hesitation in saying, that I do not consider myself bound by it." And in a later case of *Fawcett v. Hall* (b), the same learned Judge says:—"I have before stated, and I must now repeat, that I do not consider myself bound by the decision in *Hogan v. Fitzgerald* (c), which was nothing more than a moot among the Judges upon a civil bill appeal."

Now, *Hogan v. Fitzgerald* is reported in *Hudson and Brooke's Reports*, as a decision of the Twelve Judges, on a case reserved in the usual way, and as much a decision as any other on such a case; yet we find no contradiction given by any member of the Court to Judge Jebb's view of it; and, in fact, in both the cases the Court decided in direct opposition to that opinion of the Twelve Judges.

As an illustration of the view taken by the profession in England, of the meetings in Crown cases—although not as an authority—I may read the advertisement to the second part of *Sir Gregory Lewin's Crown Cases*, published in 1839. Speaking of the decisions of the Judges, he uses language which one could hardly expect to see, if the law was, that such decisions were so binding and conclusive as they are represented to be:—"The decisions of the fifteen Judges upon points reserved in criminal cases, are considered in general to be of higher authority than those of an individual Judge; but it may be observed, that the cases which come before the FIFTEEN are seldom argued by Counsel, and being considered in private, the reasons or grounds of their decisions are not furnished to the profession; whereas the decisions of a single Judge are generally upon points taken at the trial, which are discussed before him. If, therefore, they have not the authority of numbers, they have, at least, that of being the result of a judgment formed upon hearing the arguments of the opposing Counsel, and the profession are benefitted by the grounds of the decision being publicly declared."

Nor, in the practice of the English Judges in the most recent times, do I find that blind obedience to the opinions of the majority on reserved cases which is contended for; and I will mention two cases in which the contrary course appears to have prevailed. The first is before Mr. Justice

(a) 1 *Hud. & Br.* 77.

(b) *Alc. & Nap.* 253.

(c) 1 *Hud. & Br.* 77, n.

Parke, and is *Crow's* case, reported in 1 *Lewin*, 88. It is preceded, in page 86, by the report of *Thomas Smith's* case, which is also reported in *Russell and Ryan*, 516, and which was a case reserved for the opinion of the Judges, who decided by a majority of five to three, that the conviction was proper. Here was a decision of the Judges on the point; but the report of *Crow's* case states the case as precisely similar in its circumstances to that of *Thomas Smith*; but Parke, J., directed an acquittal, observing, that *he never approved of the decision in Smith's case.*

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In the case of *The Queen v. Godfrey (a)*, before Lord Abinger, the question was, whether opening and keeping a letter, under the circumstances of the case, was a felony or a mere trespass. Alexander, for the prosecution, cited *Cabbage's* case (*b*), where six Judges against five had held that it was not essential that the taking should be *lucri causâ*, but that a taking fraudulently, with intent wholly to deprive the owner of the property was sufficient; to which Lord Abinger says, "*I cannot accede to that;*" and he held, in the case before him, that there was no felony committed. I will not go at length into the cases of the disputed question as to the evidence of accomplices; but certainly, several of the English Judges have very lately pronounced opinions on that subject, adverse to what, it is contended by the late Chief Baron Joy, in his very able treatise on the subject, had been long since decided by the Twelve Judges of England.

There is another class of cases in which it is the practice for judicial authorities to seek the opinion and advice of the Judges. I allude to cases sent by the Chancellor or other Equity Judge to a Court of Law; and in reference to them, we have the highest authority for saying that they are not binding even on the Judge who seeks for the opinion. In *Lansdowne v. Lansdowne (c)*, Lord Eldon says:—"It is stated that the Lord Chancellor of Ireland, after the return of the certificate from the Common Pleas, retained an opinion, contrary to that certificate, but made the decree according to it, from deference to the Judges of the Common Pleas. In that surely there must be some mistake. For, although it is highly useful in legal questions to resort to the assistance of the Courts of Law, yet it must be well known to those experienced in the practice of Courts of Equity, that they are not bound to adopt the opinion of the Courts of Law to which they send for advice. It has occurred to me to send the same case successively to the Courts of King's Bench and Common Pleas, and not to adopt the opinion (although highly to be respected) of either of those Courts."

(a) 8 Car. & Payne, 564.

(b) *Russell & Ryan*, 292.

(c) 2 Bligh, 86.

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Now, upon the question of judicial propriety and convenience, the argument against this course is just as strong, at least, as it is against any departure on the part of a single Judge from the decisions in cases reserved. The High Courts of Justice are called on by the Chancellor to give their time and that of the public to the consideration of these questions; they are laboriously argued before them and carefully considered; yet, it has not been thought to be a breach of judicial decorum in the Lord Chancellor to treat all this labour as if it never had been called for,—to pass by the deliberate opinions of the Judges of the Courts of Law, and decide himself in direct opposition to them. What is the principle on which this is done? It is that high and overruling duty imposed on every Judge—which is paramount to all considerations, whether of mere convenience, or of respect for the opinions of others—to give judgment according to his own conscientious conviction of what the law of the land requires that judgment to be, looking for that law to the recorded judgments of the public Courts of Justice, and to the statutes enacted by the Parliament of the realm; and paying at the same time due and respectful regard to all those helps towards the formation of a right judgment, which the opinions and advice of his Brethren may afford.

I will not further occupy public time in this matter by reading the enlightened judgment of Baron Richards, printed in *Walsh's Registry Cases*, or the letters of our late eminent and revered Chancellor, Lord Plunket, addressed to that learned Judge. These documents are now before the public and the profession; and I will only add, that it greatly supports my mind in the soundness of the opinion I have arrived at, that I have in support of it, the deliberate judgment of Baron Richards, the declared approval of that course, by Lord Plunket, Sir Michael O'Loughlen, and the late Chief Baron Woulfe, and the concurrence of my learned Brothers Perrin and Ball, who have intimated it to me. I will but remark again upon what was done in *Frost's* case, and on Lord Denman's letter to Chief Justice Bushe. I look upon them as declaring no more than this, that in the case reserved, the Judge who reserves it, submits it to the decision which the majority of his Brethren may advise him to make; and so far I do not feel called on to controvert the soundness or propriety of the practice. But if they are pressed further, and if they are meant to declare that such decision is in all future cases to be treated as the settled and incontrovertible law of the land, I have no hesitation in saying, for the reasons and on the authorities I have already stated, that such a doctrine is a dangerous novelty in our law, unsupported by principle, alien to the whole genius of the judicial branch of our constitution, and having no sanction in recorded authority or practice.

But lastly, it is said—and I admit it to be true—that public inconvenience must result from the doctrine I maintain. If that inconvenience

shall prove a serious evil, it is open to the Legislature, and it will be their duty, in their wisdom, to provide a fitting remedy; but I know of no probable amount of public inconvenience comparable in my mind to the evil which must result from the introduction of the principle, that for the future the laws of this country are to be settled,—not in the public halls of our Courts of Justice, upon open argument and debate of Counsel, in the presence of the parties and the professors of the law, and by judicial reasoning delivered in open Court on judicial responsibility,—but by assemblies of the Judges in a private chamber, secluded from observation, forming their opinions without public argument, and pronouncing them without a reason even publicly assigned.

But let me not be misunderstood. It is far from my design to undervalue the opinions thus arrived at: I believe they are as conscientiously formed and entertained as any opinions delivered by my learned Brethren from their respective places in the Courts of Justice. It will never be without deep consideration, without a thorough conviction of my being right, that I shall pronounce a judgment adverse to such the opinions of the majority of the Judges—all I mean to deny is their conclusiveness of obligation, as binding for ever each individual Judge to treat them as the settled law of the land, whatever may be his own opinion or conviction to the contrary.

Sitting in this place, as legally constituted the sole Judge of the matter brought before me—called on by the suitors of the Court to do them justice according to law—I feel bound to inquire what that law entitles them to at my hands, and to give my judgment accordingly. I do not feel bound to do wrong to them, because wrong may have been done before to others; or, in the words of Sir W. Blackstone, to hold that to be law, which I am satisfied in my conscience is manifestly unjust. With the best of my ability I have endeavoured to state the reasons for my course. I will in like manner state publicly the reasons of my dissent from the opinions of the Judges in the case of *Glannon*; and I do not believe that in thus acting I shall, as appears to be apprehended by my Brother Crampton, in the concluding paragraph of his opinion, in any way compromise the honor of the Bench, the safe and wholesome administration of the law, or the advancement of public justice. It is right I should add, that I have considered this question, fully aware of the decision reported in *Jebb's Reserved Cases*, 234, by which the Judges declare, that the opinion of the majority on reserved cases is binding on each individual Judge. But if the observations I have made are of any weight, they go to shew the incompetency of the Judges to pass any such resolution, and leave the question unfettered by it. In truth, if the law had always been as those who contend for this binding obligation assert it to be, it is, I think, plain that we should have had some note of it in our books long before the letter of Lord Denman, or the resolution of a majority of the Irish Judges in 1838.

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Having said so much on the preliminary question, of my power to dissent from the opinions of the majority of the Judges in *Glennon's case*, and on the principles on which I found my position that I have that power, it is now, necessarily, from respect to that opinion, incumbent on me to expound the reasons which satisfy my mind that it is my duty to do so ; in other words, that I consider that decision to be so contrary to law that I cannot conscientiously adopt it as the rule of my judgment on these Registry Appeals. And here, at the outset, I am involved in a difficulty which is, in itself, a striking illustration of the inconvenience of the rule of obligation supposed to be inherent in these opinions of the Judges. To this hour there has not been a single reason judicially assigned for that decision. It was announced in the ordinary way, without any public reasons communicated—no Judge who has adopted it has ever stated why he did so, beyond the naked assertion that so the Judges had ruled, and, therefore, he felt bound to rule accordingly. I am ignorant, and the public at large is ignorant of the grounds of the decision ; and all I can do on the present occasion is, to state the reasons which satisfy me it ought never to have been made ; but I am unable to state, and therefore unable to encounter the reasons, whatever they may have been, on which it was based, save so far as I may be able to conjecture them from the arguments of the Counsel who appeared on that side which obtained the decision of the majority.

The question is, what is the meaning of the words “clear yearly value,” according to the provisions of the Reform Act, 2 & 3 W. 4, c. 88. It is on the one hand contended, and has been so ruled in *Glennon's case*, that these words require that the land or other property held by the candidate for the elective franchise, should be of such a value that another person solvent and responsible, and taking it as a tenant, would *bonâ fide* give for it, as an additional rent, £10 a year more than it is subject to in his hands. On the other it is insisted, that these words mean no more than this, that in the ordinary practice of cultivation, the land should be fairly capable of producing the sum of £10 a year clear profit above all rent and charges, and the expenses of production. These, I apprehend, are very different tests.—The first meaning, that the tenant has an interest for which another tenant could, as such, afford to give him an encreased rent of £10, or £20, or £50 a-year above the rent he pays, as the case may be ; the other merely that he himself in the ordinary cultivation of the property, can *bonâ fide* realise from it the given sum. In a word, the one requires that a tenant paying £10 a year, should have a holding for which the landlord might, if he pleased, get a rent of £20, and, therefore, sacrifices to him £10 a-year, being on a large scale half his own legitimate income ; while the other calls for no such extravagant supposition, but merely requires that without any sacrifice or violation of ordinary rules on either side, the tenant should hold a farm

naturally productive to the extent of £10 a year above the rent. When we consider the condition of landed property in Ireland—how little of it is held in fee-simple by the smaller class of proprietors—and that the great mass of the cultivators of the soil are holders by lease under ordinary farm rents as between landlord and tenant, it does, I confess, appear to me to be altogether unaccountable, how this solvent tenant test, as it is called, ever came to be thought of as applicable to this country; and I think I will be able to shew, that upon the whole spirit of the legislative code on the subject for Ireland, the rule of law must be taken to be this, that such a test is not to be applied, unless where it is expressly directed by legislative enactments.

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To commence with the first statute—which is one common to both countries—the 8th *Hen. 6*, c. 7,—it is thereby declared that Knights of the Shire shall be chosen by people dwelling and resident within the same counties, whereof every one of them shall have free land or tenement to the value of 40s. by the year, at the least, above all charges; and such as have the “greatest number of them that may expend 40s. by the year, and above,” shall be returned; and every Sheriff is empowered to examine each elector on oath, how much he may expend by the year.

This statute is expounded by the 10th *Hen. 6*, c. 2, to apply only to freeholders; but on the subject of the amount of qualification, it was unaltered for nearly three centuries, either in England or in Ireland; and in the construction of it, as we find in the older writers, it is plain that the amount of rent at which the freehold would let, was not the criterion adopted; but that the true test was the ordinary productive value of the freehold.

This is, I think, evident from the language of *Dalton* in his *Office of Sheriff* (a), quoted in the argument in *Glennon's* case. He says, “He which has no other freehold than common of pasture, although that be to the value of forty shillings, yet he may be no chooser; but he which hath a freehold, house or lands, of the yearly value of thirty shillings, and besides hath thereto belonging a common of pasture appendant, to the yearly value of twenty shillings, he may be a chooser.” And again, “If a man *maketh forty shillings by the year, communibus annis*, of his wood-sales, coal-mines, tithes impropriate, or the like, being his freehold, these are sufficient.”

And so the law stood both in England and Ireland, at least no authority has been cited to the contrary, for nearly three centuries—exactly as I think it stands at this day on the true construction of the Reform Act. It is material before we go to the Irish acts passed in the last century, to see what has been done by legislation in England to affect this question. The first English statute after the 10 *Hen. 6*, is the 10 *Anne*, c. 23, the 2nd section of which enacts, “that from and after the 1st day of

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“ May which shall be in the year of our Lord 1712, no person shall
 “ vote for the electing of a Knight of any Shire within that part of Great
 “ Britain called England, in respect or in right of any lands or tenements
 “ which have not been charged or assessed to the public taxes, church-
 “ rates, and parish duties, in such proportions as other lands or tene-
 “ ments of 40s. per annum, within the same parish or township where
 “ the same shall lie or be, are usually charged, and for which such per-
 “ son shall not have received the rents or profits, or be entitled to have
 “ received the same, to the full value of 40s., or more, to his own use,
 “ for one year before such election, unless such lands or tenements
 “ came to such person within the time aforesaid by descent, marriage,
 “ marriage settlement, devise, or presentation to some benefice in the
 “ Church, or by promotion to some office unto which such freehold is
 “ affixed ; and if any person shall vote in any such election contrary to
 “ the true intent and meaning hereof, he shall, for every such offence,
 “ forfeit the sum of £60, one moiety thereof to the poor of the parish
 “ or parishes where the lands or tenements lie, for which such person
 “ shall vote, and the other moiety to the person or persons who shall sue
 “ for the same, to be recovered by action of debt, bill, plaint, or infor-
 “ mation, in any of her Majesty’s Courts of Record at Westminster,
 “ wherein no essoign, privilege, protection, or wager of law shall be
 “ allowed, or more than one imparlance.”

This introduces a new test of value, viz., the land tax assessment in England, and the words are very important, as going, in my mind, a good way towards accounting for the resolutions in the *Bedfordshire and Middlesex* cases: in truth, under it no lands could confer a vote unless they were charged and assessed as lands of forty shillings value to the land tax. The next act is the 18th G. 2, c. 18 (1745), which, in section 1, gives a new form of oath, but by sec. 3 expressly provides that no person shall vote in respect of any messuages, &c., not charged or assessed towards the land tax ; and the 19 G. 2, c. 28, is to the same effect for counties of cities and counties of towns ; and with the exception of some acts passed relating to these land tax assessments, no further change was made in the elective franchise in England, until the English Reform Act was passed, which has rendered assessment to the land tax no longer necessary. The rateability to the land tax being thus made the test of the franchise, it is not to be wondered at that the principles of taxation or assessment should be applied to the mode of estimating the yearly value—indeed the act of *Anne*, made the cases identical. Now I concede that those principles are, that the land is to be rated at the rent which it would let for to a tenant—and I have no doubt that it was on a consideration of this nature that the *Bedfordshire and Middlesex* cases were decided ; besides it is to be recollected that they are cases decided on the value of the freehold to its *owner*, and in truth in England this means, generally speak-

ing, the owner of the fee: we find in those land tax acts the owner thus spoken of as contradistinguished from the tenant or occupier; but unless we are prepared to hold that it was the intention of the Legislature that no tenant paying an ordinary farm rent should enjoy the elective franchise, I think we may well doubt the application of those cases to the numerous class of freehold and leasehold tenants which constitute the great body of the population in this country, where the actual ownership of small freeholds in fee-simple is almost unknown. And this principle of taxation is in truth but one of convenience, and so expressly stated in a late case; *Rex v. Adames* (a), where Parke, J., in delivering the judgment of the Court, says:—"It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to the profit. The statute, 43 *Eliz.* c. 2, requires churchwardens and overseers to raise competent sums, by the taxation of every occupier of lands, according to the ability of the parish. Nothing is expressly said as to the principle upon which the rate should be made, but it is implied that it must be made with equality, and with some reference to the subject of occupation. Now, it is quite clear it ought not to be made according to the profit derived by the occupier himself; for if that were so, the rate must vary according to the nature of the occupier's interest. An occupier who is tenant at will at rack rent, and therefore receives a less share of the annual profit of the land than one who is tenant for years at a smaller rent, and still less than one who is a tenant in fee simple, and pays none at all, would be rateable at a less sum; a proposition which was never yet contended for. Again, it is quite clear, that though the occupier is the person who nominally pays the tax, it is in reality paid by the beneficial owner, and is a charge upon the land. In proportion as the average tax which the tenant has to pay is greater, in the same proportion will he give less rent to the owner. Ultimately, in the long run, this will always be the case; though when the tenancy is for a term more or less long, the burthen upon the landlord is postponed for a greater or less period. This being so, it follows that in order to make an equal rate, the nature of the occupier's interest must be disregarded, and the rate imposed according to some value of the subject of occupation. Usage and convenience have established this value to be not that of the estate or property itself, but that of the profit which is or might be made from the estate or property; and as it would be very difficult and extremely troublesome to ascertain the precise value of that profit during the time for which each rate is made, and in case of occasional profit both troublesome and unjust [*Rex v. Mirfield* (b), *Rex v. Hull Dock Company* (c)] to make a rate for a large sum at one time, and

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(a) 4 B. & Ad. 61.

(b) 10 East, 219.

(c) 5 M. & S. 394.

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“a small one or none at another, upon the same land, the rule has been
 “to assess according to the annual profit of the land; or, where the pro-
 “duce is not matured in one year, then upon an average of years, from
 “which profit deductions are allowed for all the expenses necessary to its
 “production. It is not material whether the whole or a certain aliquot
 “part of that net profit be rated, provided all lands of the same descrip-
 “tion are rated equally upon that aliquot proportion of the profit; and
 “in practice it is usual, and it is most convenient, to rate lands at the
 “rack-rent which they would pay to a landlord, or some certain portion
 “of it, the tenant paying all rates, charges, and outgoings; which is in
 “effect rating according to a part of the net profit only; but provided
 “it be the same aliquot part in all cases, it makes no difference.”

It is obviously in these cases of taxation a matter of indifference if all be taxed alike—no injustice can be done to any: but where the possession or the loss of the elective franchise depends on the mode of valuation, great injustice may be done by adopting that principle of estimating the yearly value. I will go now to the Irish acts: the 2 *G.* 1, c. 19, first introduces the words that the freehold may be so set as an addition to the former clause. The words of the oath prescribed by that act are these:—“You shall swear that you are a freeholder in the county of ———, and have freehold lands or hereditaments lying or being at ———, in the county of ———, of the clear yearly value of forty shillings, above all charges payable out of the same, and that you believe the same may be so let to a responsible tenant; and that such freehold estate hath not been made or granted to you fraudulently, or on purpose to qualify you to give your vote, and that the place of your abode is at ——— in ———, and that you have not been polled before at this election.”

The 19th *G.* 2, c. 11, first introduced the system of registration, and it gives two forms of oath—one to be taken at the registry, the other at the poll; the latter of which has also the same words introduced into the oath by the 2 *G.* 1, c. 19; and the 21 *G.* 2 c. 10, is to the same effect. All these statutes, I admit, contained *the additional terms*, until the 25 *G.* 3, c. 52, the 26 *G.* 3, c. 29, and the 35 *G.* 3, c. 29, all of which omit them in the form of oath to be taken by the voter. May we not presume that there were valid reasons for the omission—that the Legislature felt such a test to be not applicable to the mode of tenure in Ireland—the voters consisting almost wholly of persons having derivative interests and subject to rent; and that to enable them to qualify as voters they must have received in truth a sacrifice of rent from the owners of the soil. The 35 *G.* 3, c. 29, I have said, omits the words, and this I think from design and not accidentally, for it is retained as to houses, in sec. 55, plainly because as to that species of property it is the true and fitting test of value. Besides, omitting the allegation that the property could be so let to a solvent tenant, from the freeholder's oath, the 35 *G.* 3, c. 29, introduces other words, *viz.*, that the voter is in the actual occupation

thereof by residing thereon, or by tilling or grazing to the amount of forty shillings yearly value thereof (as the case may be). It is said these words merely add the qualification of occupation to the ownership of the freehold—but I cannot read them as having only that construction;—the words “tilling or grazing to the amount of forty shillings,” appear to me to mean tilling or grazing to an extent productive of or yielding that amount to the claimant, and I cannot understand those words in any other sense.

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There is an act nearly cotemporaneous with this—an act of great public importance, introduced by the Government of that day—the act of the 33 G. 3, c. 21, the first act for the relief of the Roman Catholics of Ireland, which contains a clause bearing on this question, and shewing, I think, very strongly what was the legislative interpretation at that day of the words “yearly value.” The 6th section of that act enables Roman Catholics having certain properties, to keep arms, viz., among others those “possessing a freehold estate of £10 yearly value:” and after making this provision, the section proceeds to require that such persons shall make affidavit at the Sessions “that they are possessed of a freehold estate yielding a clear yearly profit to the person making the same of £10;” thus declaring the meaning of the term yearly value, as synonymous with the actual productive value of the estate to the occupier—the clear yearly profits which it yields to himself—not the rent which another person might be able to give to him for it.

I now come to the 10 G. 4, c. 8, which was a branch of the legislative arrangements connected with Catholic emancipation. I will not go in detail through the sections of this act—it is sufficient to observe that this solvent tenant test, as it is called, after having been introduced and abandoned, as I think, by the Irish Legislature, in the statutes I have referred to, is again studiously and carefully re-enacted—and made the test of the franchise; it is what the Registering Barrister is to require—what the claimant is to swear to—and what the Jury on appeal must be directed to inquire into. Now I ask, why was all this done, if, as is contended, the meaning of the words “clear yearly value” was so settled by decisions that they had and could have no other meaning than that of the rent which a solvent and responsible tenant would give for the property? I pass to the Reform Act, and without going through the sections of it in detail, I find that the solvent tenant test, abandoned before, is abandoned again; it is carefully and studiously excluded from the description of the requisites of the franchise, to be ascertained by the Assistant Barrister, from the oath to be taken by the claimant of the franchise, whether freeholder or leaseholder—and from, as I apprehend by necessary consequence, from the inquiry before the Judge and Jury upon appeal.

Must I not inquire the meaning of these successive legislative changes?—am I to suppose that words carefully inserted in one act, and stu-

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diously omitted in another—restored again in a third, and again omitted in a fourth—were supposed by the Legislature to have no force or meaning at all ; but that all through the acts the omission, or the introduction of them made no difference whatsoever ?

It will, I confess, require much stronger authority to convince me of this, than the decisions in the *Bedfordshire and Middlesex* cases—decisions made on different statutes—applicable in their terms to the owner of the freehold—a person standing in a very different situation from that of the tenant at an ordinary farming rent.

There is a class of tenants to whom these observations particularly apply : I allude to those taking leases under the ordinary powers contained in settlements, and who, it is obvious, could never by such means obtain the required qualification, whatever might be the amount of the holding, as the very terms of the power ordinarily require that the best and most reasonable rent shall be had for the land, and thus necessarily exclude the possibility of applying the solvent tenant test to such holdings.

These are the considerations which have satisfied my mind, that as the law stands, having regard to the successive course of legislation in and for Ireland, and the general tenure of property here, as accounting for and explaining that course of legislation, the solvent tenant test is not to be applied in the trial of the question of value under the Reform Act. The ultimate decision of this question must probably rest with the House of Commons or its Committees, with whom rests the determination of the qualifications of those by whom its members are returned. One Committee—that in the *Longford* case, reported in *Perry & Knapp's Reports*, has already decided that the construction of the act is that which I consider to be the true one ; and in another part of the United Kingdom—namely, in Scotland—this very question has been raised and decided the same way, in language nearly the same as that in the Reform Act. I quote from *Cay's Analysis of the Scottish Reform Act*, p. 354. The question arose on the section of the Scotch Reform Act which gives the franchise to certain leaseholders ; and the words of it, as given in p. 330 of that work, require, in cases of certain terms, that “the clear yearly value of the tenant's interest, after paying the rent and any other considerations due by him for his said right is not less than £10 ; or for a period of not less than nineteen years, is not less than £50.” Now, this section as to value only differs from that in the Irish act in omitting the word “beneficial,” which I therefore do not rest on ; and particularly as that word beneficial has been considered of doubtful import, and, in truth, to mean no more than that the party is in the enjoyment of the property to his own use. Upon this section of the Scotch act, it has been decided by the Court of Appeal in Registry Cases for that country, and is, I apprehend, now the settled rule of law there, that the test of value is, not what another tenant would give for

the farm, but what is the value of the surplus profits of it, after deducting the rent and the costs and expenses of culture. It is thus stated in page 354-6, paragraph 292 :—" If then, the farm be in the claimant's own occupancy, in ascertaining the value of his interest, the rent must be deducted from the estimated produce. Where the subject is subset by the claimant, the value of his interest will be the difference between the sub-rent and the principal rent. But, in cases of occupancy the question remains, whether any farther deduction from the value of the produce falls to be made. It would rather appear, that the expense of culture, and every charge on the tenant, must also be deducted. The plain meaning of the words would appear to be,—the annual sum which the tenant can set aside as profit. His interest is obviously, that which he can employ for his own use and the support of his family. To determine, this value, the expense of seed, labour, &c., must be ascertained, and along with the rent, deducted from the annual value of the produce of the farm; and this interpretation has been adopted. In calculating the labour, it has been a question, whether that of members of the tenant's family ought to be estimated and deducted in cases where they are not paid; and it is believed different opinions have been entertained on this point. If the value of the interest is to be taken abstractly, the question is simply, what expense of labour is necessary to cultivate the farm on the one hand, and what annual sum could be got from another person for the produce on the other; and in this view, wages of sons, &c., should be estimated and deducted,—otherwise, if the tenant have a large family of sons, there may be nothing to deduct for labour at all. It has been argued, that the value of the tenant's interest may be more than the farm would bring to him if subset, as he may by his skill produce larger returns than an ordinary valuator would expect: and that what he could get in subsetting, may be no more than the rent he himself pays. But it would appear that the only mode of arriving at any clear idea of the value, is by the ordinary mode of ascertaining the probable produce *communibus annis*, in the opinion of valuers, or, if the lease have subsisted for some time, ascertaining the actual produce from the tenant's books, corroborated by some external evidence, and deducting the rent, seed, and labour, and any outlay (such as schoolmaster's salary) for which he may be liable.

"J. K. claimed as a tenant on the clear yearly value of his interest in a lease of nineteen years. The rent was £40. The neighbouring farmer was examined in the Registration Court, and stated, that the arable land, of which there were thirty-two acres, was worth about 35s. an acre of rent; and the pasture, 8 acres, worth 20s. in all £64 a-year, deducting from which the landlord's rent, there remained only £24 a-year profit. The Sheriff *rejected*. On appeal, the same witness was examined as to the value of the different kinds of grain then on the

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"ground, &c., and the profit on the cows of the farm (*e. g.*, ten acres oats, at £9,=£90, five of barley, at £9. 12s=£48, &c.) which he stated as amounting to £267. He said that the mode of cropping at present pursued was a fair one. That the arable land is worth 35s. an acre of rent, and the pasture from 15s. to 20s. an acre. That he included, in his estimate, the keep of horses; in short, he calculated just as if the tenant had hired the ploughing. He had not included the expense of fences, as most of the fields were bounded by plantations, the fences of which are usually kept by the landlord. After paying £40 rent, he thought the farm might be worth £50 or £60, allowing for servants. That his estimate was on the supposition that servants were hired for ploughing, and he allowed for their wages; but he did not allow any thing for other servants. *Argued* for the claimant,—The witness establishes a clear profit. The criterion in estimating the property tax used to be, that of the produce, one-third went for rent, one-third for expenses, and one-third for profit. Thus the profit of the tenant here would be £88 and upwards. It is the profit of the tenant which is to be considered, not the difference between what the farm would bring and the rent. In this instance, the landlord has allowed the tenant to hold at £40 rent—it is not an ordinary lease—he is a *kindly* tenant; therefore, his interest consists, first, of the difference between the present rent, and what could be got by the tenant if he were to sublet, which is £24; and, secondly, of the value of the profit on the annual produce of the farm, however much that may be brought by his skill. *Answered*,—the only criterion which can be resorted to is the marketable value of the farm, which is only £64. The property tax criterion does not apply; the farmer's profit, estimated under that act, was *capital and skill*. The Reform Act refers to the value of his *interest*, not to *profit*, for that depends upon skill, not upon the lease as marketable. If the lease were in the hands of minors, nothing could be calculated upon *their* skill. The Court *observed*—that a species of evidence had been adduced in the Appeal Court, entirely different from that before the Sheriff, and conceiving it the most correct mode of ascertaining the surplus value, they *admitted*, *altering unanimously*.—*Kinnaird, Linlithgowshire, 1832.*

I do not mention this case as a decision binding in this country as an authority on the subject; but I think it is very deserving of attention in considering the question on the Irish statute, and particularly as I do not observe that it rests on any peculiarity of Scottish law, or any other considerations inapplicable here.

For the several reasons, therefore, which I have stated, I adhere to the opinion I before announced, that the solvent tenant test, as it is called, should not be applied in estimating the value of the property required to confer the elective franchise in Ireland under the Reform Act.

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Queen's Bench.

JAMES COFFEY

v.

RICHARD BARRETT, Proprietor of *The Pilot Newspaper*.

(Queen's Bench.)

Michs. Term.
May 24.
Nov. 3.

THUS was an application, on behalf of the defendant, to set aside the parliamentary appearance entered in this cause, for irregularity; upon the ground that there had been no valid or personal service of any writ in this cause; and also to set aside the writ and notice at foot thereof in this cause for irregularity, and inasmuch as the name of the plaintiff's Attorney was not stated at foot of said notice, pursuant to the statutable enactments in that behalf.

The writ was the common serviceable *capias*, with the statutable notice at foot, and to each the name of the plaintiff's Attorney was thus subscribed:—"Edmd. L. Hearn, Attorney for," &c.

The affidavit of the process-server, after setting forth the writ, proceeded to state, that upon the 17th of April 1841, "he the deponent served the said defendant with the said writ or process, and with the said notice, by delivering unto and leaving with a clerk of the defendant, at the office of the said defendant, where the newspaper of which the said defendant is the registered proprietor is published, situate at 80 Marlborough-street, in the city of Dublin, a true copy of said writ or process and of said notice, and at the same time shewing to him the said original writ or process and notice at the foot thereof, and desired him to give said writ so served to the said Richard Barrett, his master." In addition to that affidavit, there was the common affidavit by the plaintiff's Attorney, to verify; and upon these two affidavits the parliamentary appearance was entered.

To render the service of process at the office of the proprietor of a newspaper, instead of personal service thereof, valid, and sufficient to warrant the entry of a parliamentary appearance, such facts must be spread upon the affidavits of service, as will bring the case within the provisions of the 6 & 7 W. 4, c. 76,* and from which it will appear to the Court that the suit or proceeding against the defendant is in relation to his character of newspaper proprietor.

A statement of service, "by leaving with a clerk of the defendant at

the office of the said defendant, where the newspaper of which the said defendant is the registered proprietor is published, situate, &c., a true copy," &c.—*Held*, insufficient.

In this case the plaintiff might have applied for an order, that the service already had be deemed good service.

Semble—That the christian and surname of the Attorney for the plaintiff should be signed in full at the foot of the English notice attached to the *capias*.

* The 9th section of the 6 & 7 W. 4, c. 76, enacts, "That in any suit, prosecution or proceeding, civil or criminal, against any printer, publisher or proprietor of any newspaper, service at the house or place mentioned in any such declaration as aforesaid at the house or place at which such newspaper is printed or published, or intended so to be, of any notice or other matter required or directed by this act to be given or left, or of any summons, subpoena, rule, order, writ or process of what nature soever, shall be taken to be good and sufficient service thereof respectively upon and against every person named in such declaration as the printer, publisher, or proprietor of the newspaper mentioned in such declaration.

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The writ issued upon the 16th of April, returnable upon the 17th; the appearance was entered upon the 26th, and the notice of this motion served upon the same day.

The first question in this case turns on the true construction of a recent statute. It is clear, that according to the 43 *G. 3*, c. 53, this parliamentary appearance is utterly irregular. Previously to 1803, the Court of Exchequer was the only Court in which a parliamentary appearance could be entered; but, even in that Court, it was necessary that the party plaintiff should sue out process of contempt to a Serjeant at Arms, and obtain a return upon that process. The common law was peculiarly strict in reference to the necessity of a party's appearance in Court, and due personal service upon him of the process. In *Williams v. Lord Bagot (a)*, a custom was declared bad in law, because in an action of debt, the party not having been personally served, and not having appeared, although his goods were seized and notice left at his house, the plaintiff proceeded in the action. The 43 *G. 3*, c. 53, was passed to assimilate the practice of the Courts. By the 3rd section, the plaintiff is permitted to enter a common appearance for the defendant, and to proceed thereon, upon affidavit being made and filed, in the proper Court, of the personal service of such process as aforesaid; and by the 7th section, another guard to insure personal service is enacted, and that is, an affidavit to verify by plaintiff or his Attorney. The 8th section of the statute empowered *the Court*, in cases where it appeared that process could not be personally served, to substitute such other kind of service *as to them* should seem meet. This substitution of service is regulated by the 114th Rule of the Court, which is given in *Batty R.* 61, 62, 63; and the Officer cannot, *ex mero motu*, substitute service. In this case, there has been no personal service, and no application to substitute; but it will be contended that the defendant here belongs to a class of persons who have been placed beyond the pale of that law which is common to all the rest of her Majesty's subjects, namely, proprietors of newspapers. The statute on which this question is raised is 6 & 7 *W. 4*, c. 76. It is a fiscal act of Parliament in its title and preamble; the 6th section requires a declaration at the stamp-office. The 8th section directs how these declarations shall be filed and kept for their safe custody; and a certified copy of such declaration is made evidence: and section 9 provides for the service of process. For the purpose of this motion I am willing to concede, that this section provides for the service of writs upon persons who have signed the declaration of proprietorship, upon a cause of action against him in his character of proprietor; it is obvious that this section does not refer to actions against a proprietor of a newspaper in the ordinary concerns of life, unconnected with his paper; thus, in an action of

(a) 3 B. & C. 772; S. C. 5 D. & Ry. 719.

assault, or on a bill of exchange, the proprietor of a newspaper is not to be proceeded against *qua* proprietor. Three things must concur; the subject matter of the action must relate to the special character of proprietor; it must be a service at the house or place mentioned in the declaration; and it will be good service only as against the person named in such declaration. The Court has not been moved upon affidavits; and the question is, does this writ, and do the affidavits filed, justify the entry of this parliamentary appearance. I contend that they are utterly insufficient. The name of any newspaper is not stated—that Mr. Barrett ever signed a declaration is not stated—that any such declaration was ever signed is not stated—the cause of action is not stated—that the defendant is sued in the character of proprietor does not appear—it is not sworn that the writ was served at the house or place mentioned in the declaration. It is not shewn that the defendant belongs to the class of individuals who are within the statute, or that the action is against him in that character—and unless these things appear on affidavit, then a defendant does not lose the statutable protection of personal service. Now, in the writ, the defendant is styled Richard Barrett, Esq.: that is not, in this country, a title peculiar to newspaper proprietors; the nature of the action does not appear, and there is no indorsement on the back of the writ; the affidavit does not carry the case farther. Patrick Kelly, the bailiff, swears that he served the writ on a clerk of the defendant at the office of the defendant, where the newspaper, of which the defendant is the registered proprietor, is published; the name of the newspaper is omitted; all reference to the existence of a declaration, such as the act contemplates, is omitted; and the words registered proprietor are introduced, which word “registered” does not, in the statute (10th section) refer to the proprietor, but to a newspaper being registered. Could a criminal information be obtained upon that evidence? Certainly not. In *Rex v. Donnison* (a) the Court would not grant even a rule to shew cause against a criminal information upon such evidence; and, therefore, upon these grounds this parliamentary appearance is clearly irregular. The next objection is to the writ, and English notice at foot; the 6th section of the statute 43 G. 7, c. 53, requires this notice; and that said notice shall be signed by the Attorney for the plaintiff with his *christian* and surname, &c.: in this case, the christian name is omitted, and this enactment is compulsory; *Chapman v. Ryall* (b). Similar objections have been held good in *Grojan v. Lee* (c); *Dand v. Barnes* (d); *Eggleston v. Stokes* (e); and *Reynolds v. Hankin* (f). It may be said this is a technical objection; but, I answer that, by an observation of Lord

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(a) 4 B. & Ad. 698.

(c) 5 Taunt. 651.

(e) Batty, 213.

(b) Barnes, 415.

(d) 6 Taunt. 5.

(f) 4 B. & Ald. 536.

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Ellenborough in *Roubel v. Preston* (a)—“If the known regular forms be departed from in one instance, a thousand whimsical returns might be framed and great confusion introduced.” But here is the plain violation of a positive law decided to be compulsory and not directory. If the cases of Attornies signing their bills should be relied on, they do not apply to this case; these decisions went upon the grounds that the christian name was not required by the statute; and, also, that the name of the firm is that which may be, with most propriety, used.

Mr. Fitzgibbon and Mr. O'Hagan, *contra*.—The notice of motion relies upon two grounds of irregularity only, namely, irregularity in the service, and irregularity in the signature of the plaintiff's Attorney to the notice. With respect to the latter, the defendant has waived any objection to that, by allowing the plaintiff subsequently to enter a parliamentary appearance for the defendant. The 24th New General Rule contains a provision to this effect, and there are several cases collected in *Chitty's Archb. Pr.* 918, to the same effect; and in *Gaire v. Goodman* (b), it is expressly decided, that if a party lies by after an irregularity in the proceedings, and knowingly permits the other party to take a further step in the cause before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself. In this case Mr. Ford, the Attorney for the defendant, must have known the writ issued, and after that knowledge he allowed the plaintiff to enter the parliamentary appearance, and thereby waived all right to make this objection. Moreover, a practice has long prevailed for Attornies who have several names, to sign only one of their names to the writ, or in the form of the signature in this case; and in *Sterne in Error v. Guthrie* (c) Bushe, C. J., lays it down, that the practice of the Court is the law of the Court, “even although that practice should be repugnant to the general principles of the common law, or even to the provisions of particular statutes;” and the same was solemnly decided in *Rex v. Keon*, referred to in that case. There is no Irish decision upon the point, and that, coupled with the fact that the practice has existed to a very large extent, is proof that the objection was not considered tenable. In 1 *Stewart's Pr.* 85, a case is referred to, decided upon the 7 G. 2, c. 14, which requires an Attorney to furnish costs one month before he commences an action for the recovery thereof, and to subscribe the bill with his proper hand,—and in that case the Court held that such an abbreviation as *Hash.* for *Haszokiah* was not fatal. There are a class of cases which bear upon this point, and which were decided upon the analogous English statute, the 2 W. 4, c. 39, s. 12. The christian names are not required by the words of the 12th section, but the schedule of the act gives both names, and it is in

(a) 5 East, 290.

(b) 2 Smith, K. B., 391.

(c) Fox & S. 55.

that way quite analogous to the Irish statute; and there are several cases in which it has been held under that statute, that the initials of the name and the name of the firm have been sufficient; and this, it is submitted, ought to dispose of the present objection: *Engleheart v. Eyre* (a); *Pickman v. Collis* (b); *Hartley v. Rodenhurst* (c). And in *Youlton v. Hall* (d) Parke, B., says—"It is quite enough with regard to an Attorney, "if such a description be given as can mislead nobody."—and in *Yeo & B.'s Pr.* 65, that case is cited upon this very point.

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With respect to the second irregularity relied on, the service under the 55 G. 3, c. 80, s. 24, was to all intents and purposes the same as the personal service under the 43 G. 3, so far as respects those cases to which it applied. The words in the 9th section of the 6 & 7 W. 4, c. 76, are very general—"any writ or process of what nature soever,"—and do not confine the provisions of this statute to newspaper proprietors alone, in their character as such newspaper proprietors; and with respect to the objection that we have not spread our upon our affidavits all the facts which would bring this case within the provision of the statute, there is no case in which that appears to have been required; and this objection does not appear to have been taken in *Redmond v. Lavelle* (e), which was a motion like the present, to set aside the same proceeding under the 55 G. 3, c. 80. We have now in Court the declaration from the Stamp Office, which shews fully to the Court the character of the defendant, and that he is a person within the provision of this section, and that the service was effected at the proper place.—[The Court having here intimated their opinion that the parliamentary appearance could not be sustained]—Then the notice in this case is wrong in asking to set aside the writ and the notice at foot, that notice being no part of it, *Lloyd v. Maurice* (f); and the case of *Grojan v. Lee* has been since overruled in *Eyre v. Walsh* (g), and in *Butler v. Cohen* (h); and the defendant is not, therefore, entitled to costs. *Engleheart v. Eyre* (i); *Pickman v. Collis* (k); *Hartley v. Rodenhurst* (l); *Chitty's Arch. Pr.*, and cases there cited; 1 *Stew. Pr.* 85.

Per Curiam.

Two very serious objections have been taken to the regularity of the plaintiff's proceedings in this case; upon one of them it is unnecessary, however, at present to decide, as we are all clearly of opinion that the facts required to bring this case within the statute, and to sustain the service permitted in cases coming within the statute, ought to have been spread

(a) 2 Dowl. P. C. 145.

(b) 3 Dowl. P. C. 420.

(c) 4 Dowl. P. C. 748.

(d) 7 Dowl. P. C. 176.

(e) 1 Jones, 454.

(f) 9 East, 528.

(g) 6 Taunt. 333.

(h) 4 M. & Sel. 335.

(i) 2 Dowl. P. C. 145.

(k) 3 Dowl. 429.

(l) 4 Dowl. P. C. 748,

M. T. 1841. out upon the affidavit; or the plaintiff ought to have come to the Court
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Let the service in this cause, and the parliamentary appearance entered thereon, be set aside; and no costs of this motion (a).

(a) In 1 *Stewart's Pr.* 85, in note (m) to the clause in the section of the 43 G. 3, requiring the Attorney's name to the foot of the English notice, it is said—"I understand there was a decision on this point about 1806, in this Court, by which it was held that the Attorney's name ought to be inserted *in full*; but I have not been able to trace the case."

JOHN JONES, *dem.* of WILLIAM LEADER, and others,

v.

JOHN DUGGAN.

June 3.
 Nov. 9.

"Articles of agreement, executed by A. and B., whereby A. granted, bargained, sold and leased unto B., all that and those, the lands of, &c., for some time actually in the possession and tenancy of B., to have and to hold unto B., his heirs, executors, &c., from the 25th of March *next ensuing*, for and during the term of the following lives, and the survivors and survivor of them, or for the term of thirty-one years concurrent therewith, or for which ever of them as shall longest last or subsist; that is to say, &c. naming the lives, "at the yearly lump-rent of £40, clear, &c.; said rent to be paid by two even and equal half-yearly payments, that is to say, on every 29th of September and 25th of March next ensuing; leases to be perfected at the request of either party, *with the usual clauses and covenants* between landlord and tenant;" *Held*, that this instrument amounted to a present actual demise for the term of thirty-one years, and was not, so far as respected said term, a mere executory agreement.

EJECTMENT on the title.—This was an action of ejectment on the title, brought for recovery of all that and those the lands of Cummera Connell, in the county of Cork, and was tried at the last Spring Assizes for that county, before Serjeant Greene. The defendant relied upon a subsisting demise under the following instrument.—"Articles of agreement entered into this 10th day of November, in the year of our Lord 1825, by and between William Leader, of Mount Leader in the county of Cork, Esq., of the one part, and Murty Duggan of Cummera in said county, farmer, of the other part; witnesseth that the said William Leader, for himself, his heirs, executors, administrators and assigns, hath granted, bargained, sold and leased, unto the said Murty Duggan, his heirs, executors, administrators, &c., all those, that part of the lands of Cummera in the barony of Duhallon, county of Cork, for some time actually in the possession or tenancy of the said Murty Duggan, together with the rights and appurtenances thereunto belonging, to have and to hold unto the said Murty Duggan, his heirs, executors, &c., from the 25th day of March ensuing, for and during the term of the following lives, and the survivors and survivor of them, or for the term of thirty-one years, concurrent therewith, or for whichever of them as shall longest last or subsist; that is to say, for the life of Murty Duggan, now aged about six years, for the life of John Duggan, now aged about four years, and for the life of Michael Duggan, now aged about two years; said children being the sons of John Duggan, now residing and occupying the said farm of

"Cummera, to whom a reversion is to be made, at the yearly lump-rent of £40 sterling, clear over and above all manner of taxes or charges; ^{M. T. 184 .} ^{Queen's Bench.} said rent to be paid by two even and equal half-yearly payments,—that ^{JONES} is to say, on every 29th day of September and 25th day of March ^{v.} next ensuing. Leases to be perfected at the request of either party, ^{DUGGAN.} with the usual clauses and covenants between landlord and tenant. In witness whereof the said parties hereto have hereunto put their hands and seals, the day and year first above written.

(Signed) "William Leader.—Murty Duggan."

This instrument was impeached, upon the ground of forgery of the name of Mr. Leader senior, father of the lessor of the plaintiff, and contradictory evidence was given as to the handwriting of his signature thereto. Counsel for the lessor of the plaintiff submitted, that this article did not amount to a demise—that it was a mere executory contract—because it purported to pass a freehold and term concurrent; and as it could not pass the freehold, the interest being to commence *in futuro*, that nothing passed thereby; and called upon the learned Judge to direct the Jury to find for the plaintiff upon this ground, whatever their opinion might be as to the genuineness of the instrument. The learned Judge refused to do so, but reserved this point for the consideration of the Court above, with liberty to the plaintiff to move to have a verdict entered for him, in case the Jury should find for the defendant; and he directed the Jury to find for the defendant, if they believed the agreement was signed by Mr. Leader, senior. The Jury found a verdict for the defendant.

A conditional order had been obtained on a former day, pursuant to the liberty reserved, against which—

Messrs. *Smith, Q. C.*, and *Freeman, Q. C.*, now shewed cause.—This instrument amounts to a present demise, notwithstanding the clause in it to the effect that leases were to be perfected thereafter. All the cases upon this subject are collected in *Bythw. Conveyancing*, commencing at page 266; and the result of them establishes that this instrument amounts to a present demise. The decision in *Maldon's case* (a), which has been acted upon ever since it was pronounced, establishes that the circumstance of a provision for the execution of a future lease does not prevent an instrument like the one in question operating as a present demise; the same principle was ruled in *Doe dem. Walker v. Groves* (b), where Lord Ellenborough lays down that the agreement for a future lease "was a stipulation only for the better security of the lessee;" and also in *Poole v. Bentley* (c), which case, Taunton, J., said in *Warman v. Faithful* (d)

(a) Cro. Eliz. 33.

(b) 15 East, 244.

(c) 12 East, 168.

(d) 3 Nev. & M. 139.

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"he always considered had settled the law upon this question:" and *Alderman v. Neale* (a); *Doe dem. Philip v. Benjamin* (b) are authorities for the same position. In *Woodfall's L. & T.* 57, it is said—"Whatever words amount to a grant, are sufficient to make a lease: and it may be laid down for a rule—that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for any determinate time, whether they run in the form of a license, covenant or agreement, are themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most pertinent words had been made use of for that purpose." As to this being a lease for lives and years concurrent, such a demise has never been held to be a merger of the term; and I cannot see the reason why, if the instrument fail to give a freehold, it should not be a good grant of the term. Upon this part of the case *Mellows v. May* (c) may be cited: but that case is also to be found in *Moore's R.* 636, and it is referred to in 4 *Bac. Ab.* 879, where it is said that this case "is differently and more correctly reported as to this point, in *Moore*; for there it is considered as a good surrender, because the second lease was good by virtue of the subsequent livery." The following cases and authorities were also referred to:—*Wright v. Cartwright* (d); 2 *Sug. on Pow.* 539; *Co. Lit.* 49, a: *Noy's Max.* 31.

Mr. Henn, Q. C., and Mr. Longfield, *contra*.—The manifest intention of the parties, and the circumstance that something more was intended to be done, as appears from the passage as to making a future lease, *with usual covenants*, and which, we contend, renders this instrument a mere executory agreement, will establish a great distinction between the present case and the cases upon which the defendant's Counsel have relied. This will appear from the cases of *Painter v. Sturgeon* (e) and *Morgan dem. Dowding v. Bissell* (f). In the latter case, *Poole v. Bentley* was cited, and the Court decided against it; and Mansfield, C. J., noticed especially the proviso in the agreement with respect to *usual covenants* between landlord and tenant. It is further to be remarked, with respect to this case, that it was decided before *Doe dem. Walker v. Groves*, and was not cited in that case—which is the only case in which an instrument containing a provision for the insertion of "usual covenants" was held to be a present demise; and for this reason, that what constitutes such covenant, as was observed by Chief Justice Mansfield in *Morgan dem. Dowding v. Bissell*, must frequently be a question for a Jury. All the cases cited at the other side, *Doe v. Groves* included,

(a) 4 Mee. & Welsh. 704.

(b) 9 A. & E. 644; S. C., 1 P. & Dav. 440.

(c) Cro. El. 874.

(d) 1 Bur. 283.

(e) Noy. 128.

(f) 3 Taunt. 65.

were cases of terms of years only; and in *Warman v. Faithful*, and all the other cases relied on, there was every thing in the instrument to make it amount to a contract sufficient at law, and to give the tenant all the remedies he would have had under a formal demise. In *Brook (a)*, Coleridge, J., says, "The intention of the parties collected from the terms of the instrument must determine whether that instrument be a lease, or only an agreement;" and in *Chapman v. Townner (b)*, the Court held an instrument like the present to amount only to an agreement, upon the ground that there was a clause in it that all usual covenants should be inserted in a lease to be perfected. A similar decision was come to in *Brashier v. Jackson (c)*, although in this case it was a part of the instrument that the lands should be entered immediately, and the rent to be paid from the following September: and *Dank v. Hunter (d)* is an authority to the same effect. The intention of the parties at the time of the contract is the ground upon which the Courts always rest their judgments; and in 4 *Bac. Ab. T. Lease*, 821, it is laid down, that "If the most proper form of words of leasing are made use of, yet if, upon the whole deed, there appears no such intent, but that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties, by construing a present lease, when the intent was manifestly otherwise;" and in support of this position the case of *Sturghion v. Painter (e)* was cited; and although *Noy's Reports* are not considered of high authority, this case of *Sturghion v. Painter* is relied upon in support of the judgment of the Court in *Goodtitle v. Way (f)*. In the present case, it is impossible to effectuate the intention of the parties by construing this a present demise, as the freehold interest could not pass thereby. They also relied upon the cases of *John v. Jenkins (g)*, *Browne v. Warner (h)*, *Doe v. Smith (i)*, and *Pinero v. Judson (k)*, where the Court held the instrument a present demise; and Tyndal, J., put it distinctly upon the ground of the manifest intention of the parties at the time the instrument was executed; and in all the cases relied upon for the defendant, the intention of the parties was not done violence to, the whole interest agreed on being held to pass by the instrument—which distinguishes them from the present case. The following cases were also mentioned to the Court by Mr. Longfield:—*Goodtitle v. Way (l)*, *Doe v. Ashburner (m)*, *Stone v. Rogers (n)*, *Doe v. Browne (o)*, and *Bicknell v. Hood (p)*.

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(a) 1 Mood. & R. 511.

(c) 6 Mees. & W. 549.

(e) Noy, 128.

(g) 1 Cr. & M. 227.

(i) 6 East, 539.

(l) 1 T. R. 735.

(n) 2 M. & W. 443.

(b) 6 Mees. & W. 100.

(d) 5 B. & Al. 322.

(f) 1 T. R. 735.

(h) 14 Ves. 156.

(k) 3 Moo. & P. 497.

(m) 5 T. R. 163.

(o) 8 East, 165.

(p) 5 Mees. & W. 104.

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BURTON, J.,* this day (9th Nov.) delivered the judgment of the Court. This was an ejectment upon the title, brought by the lessor of the plaintiff as landlord, to recover the possession of certain lands described in the ejectment, and held by the defendant as his tenant; and the defence relied upon at the trial was, that there was a subsisting demise under which the defendant held the lands in question. On the part of the lessor of the plaintiff this defence was resisted upon two grounds: first, it was insisted, that the instrument relied upon as a demise, and importing to have been executed by the father of the lessor of the defendant, was not genuine; the signature of the late Mr. Leader being, as it was alleged, counterfeit; that question, however, was left to the Jury, who found for the defendant upon it, and it must now, therefore, be considered as a genuine document between the parties. In the next place, it was contended that, admitting it to be a genuine instrument, it did not amount to an actual demise; that it was no more than an executory contract, to be afterwards executed by a more solemn conveyance. This was argued upon two grounds: first, it was insisted that from the terms of the instrument, and the circumstance of its containing a clause for a lease at a future period with usual covenants, it amounted to no more than an agreement for a future lease; and secondly, that the term purported to be given or agreed upon, being a term of three lives or thirty-one years, and the instrument being such that a freehold could not pass thereby, being a freehold *in futuro*, that it could not amount to a demise for thirty-one years—that not being such an interest as was in the intention of the parties at the time of the execution of the instrument; and, therefore, that this instrument could only be held to be a mere executory agreement. His Lordship then read the document, and said that if this had been a mere article for the thirty-one years, and had contained nothing about the three lives, it would, in that case, appear to him, upon authorities which are very numerous, that this instrument would clearly amount to an actual demise, with a stipulation for a more formal demise—the stipulation for a more formal demise not making it executory. The contract was to hold from the 25th of March next after the date of the instrument, and it made the first payment of rent to commence upon that day, being for the last gale of the tenancy from year to year, in order to prevent its operating as a surrender of the tenancy from year to year; but that cannot affect the question whether or not the contract was executory. It appears to me perfectly plain that it was an executed contract from the 25th of March then next; and, thus, that it was a future demise to commence at a certain specified time. This construction is supported by several recent authorities; *Doe dem. Philip v. Benjamin—Warman v. Faithful*, and other cases that have been cited, establish beyond all doubt, that such is the operation of an instrument like the present, where

* This case was argued before the retirement of the late Lord Chief Justice Bushe.

a term of years is the subject of the contract. But then, in the present case, we must consider how far that rule of construction may be affected by the lives which are included in the present contract. With respect to the intention of the parties, it is perfectly clear, that the intention was to give the tenant a lease for three lives, and for the lives and life of the survivors and survivor, and a concurrent term for thirty-one years, the operation of which expressed properly would be a freehold lease for three lives, with a contingent remainder of thirty-one years; to commence upon the 25th of March next following the date of the instrument, but the years not to be in legal existence until the determination of the lives. Now, it is quite true, that this intention fails, by the grant for lives being to commence at a future time, and this makes the contract, so far as respects the lives, executory; but that does not make it executory as respects the term of thirty-one years. The entire intention of the parties would be substantially effected by this construction; namely, that the lessee shall have a freehold lease for the lives named, and a chattel interest from the 25th of March then next after the execution of this instrument; and the term is not thereby merged, but merely suspended while the freehold interest subsists. Conceiving, therefore, that the grant for years is effectual for years, and is actually created and in operation, and that the contract, so far as respects the freehold interest, is merely executory, we are of opinion that the direction of the learned Judge to the Jury was quite correct; and that the defendant is entitled to hold the verdict which he has obtained.

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Rule discharged.

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Nov. 5, 9, 23.

THOMAS SMALL v. WILLIAM BRUCE DRUMMOND.

To a declaration in *indebitatus assumpsit*, the defendant pleaded that the promises, &c., were made jointly with one T. P. H. and the defendant; and that the plaintiff sued the said T. P. H. in *assumpsit*, for not performing the identical promises, &c., in the present declaration mentioned, and the Jury assessed the damages of the plaintiff on occasion of the non-performing of the said promises, &c., which were the identical promises, &c., in the present declaration mentioned, to a certain sum, which the said T. P. H. afterwards paid to the plaintiff, and the plaintiff accepted the same in satisfaction and discharge of the said damages, &c., which had been so assessed to him; the plaintiff replied, that he did not accept and take the said monies in satisfaction and discharge

Assumpsit.—The declaration in this case contained the common *indebitatus* counts for money lent, money paid, &c., and so much for money due upon an account stated; the damages were laid at £1000. To this declaration the defendant pleaded—first, *non assumpsit*; and, secondly, by leave of the Court, &c., *actio non*; because he saith that the said several promises and undertakings in the said declaration mentioned, were, and each of them was, made jointly with one Thomas Patrick Hayes, and not by the said defendant alone, to wit, at Dublin, aforesaid. And the said defendant further saith, that after the making of the said several promises, &c., to wit, in Michaelmas Term 1839, in the Court of, &c., the said plaintiff impleaded the said Thomas Patrick Hayes in a certain plea of trespass on the case, on promises, to the damage of the said plaintiff of £3000, for not performing the very same identical promises and undertakings in the said present declaration mentioned; and the said T. P. Hayes thereupon, afterwards, to wit, in the said last-mentioned Term, made defence in the said plea, and brought into the said Court there, to the credit of the said cause, the sum of £1872 sterling; and as to all the residue of the monies mentioned in the declaration of the said plaintiff against him, pleaded that he did not undertake or promise in manner and form as the said plaintiff had thereof complained against him, as aforesaid; and of that the said T. P. Hayes put himself on the country, and the said plaintiff did the like, and such proceedings were thereupon had in the said plea: that afterwards, to wit, on the 23rd day of April in the year of our Lord 1840, at the said Court, the said plaintiff and the said T. P. Hayes, by their respective Attornies, came before, &c.; and a Jury of twelve men being duly summoned, and to speak the truth of, &c., being sworn, said, upon their oaths, that the said T. P. Hayes did undertake and promise in manner and form as the said plaintiff had complained against him, as aforesaid; and they then and there assessed the damages of the said plaintiff—on occasion of the non-performing of the said promises and undertakings, which were the same identical promises and undertakings in the present declaration mentioned, over and above his costs and expenses by him about his suit in that behalf expended—to £350; and for those costs and expenses, to 6d., as by the record, &c., appears. And the said defendant in fact further saith, that

of the said causes of action against the defendant in the present action.—To this replication the defendant demurred specially. *Held*, that the replication was bad as not being a direct traverse of the matter alleged in the plea; but the plea being bad on general demurrer, as not being an answer to the plaintiff's declaration, the demurrer was overruled, and judgment was given for the plaintiff.

after this said sum of £1872 had been so brought into the said Court of our said Lady the Queen, before the Queen herself, by the said T. P. Hayes, as aforesaid, to wit, on, &c., to wit, at, &c., the said plaintiff drew out of the said Court, and obtained payment of the said sum of £1872. And the said defendant in fact further saith, that afterwards, and after the giving of the verdict aforesaid, by the Jury aforesaid, to wit, on, &c., to wit, at, &c., the said T. P. Hayes paid and satisfied unto the said plaintiff the said further sums of £350, and 6d., so assessed by the said Jury for the said plaintiff as aforesaid; and that the said plaintiff then and there accepted the same in satisfaction and discharge of the said damages, costs and expenses, which had been so assessed to him as aforesaid, and this the said defendant is ready to verify, &c.

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To the first plea the plaintiff filed a *similiter*; and to the second plea, *precludi non*; "Because he saith that he the said plaintiff did not accept and take the said monies in the said last-mentioned plea in that behalf alleged, in satisfaction and discharge of the said causes of action against the said defendant, in the said declaration above in that behalf alleged as aforesaid,"—concluding to the country. To this replication the defendant demurred, and assigned the following causes of special demurrer thereto: That the said replication is neither a pleading in confession and avoidance, nor a traverse of the said second plea, or of any allegation therein contained: and, also, that the said replication tenders an issue upon a statement not contained in said second plea, and concludes to the country instead of with a verification: and also, that the said replication is argumentative, and no certain or sufficient issue can be taken thereon; and that it puts in issue at once the identity of the promises in the declaration mentioned with those for breach whereof the plaintiff formerly recovered damages against T. P. Hayes, and the acceptance of certain monies in satisfaction thereof; and also, that the said replication is an attempt to send a question of law to be decided by a Jury; and that the said replication is uncertain, in not shewing what monies and what promises are therein referred to: and also, that the said replication seeks to take issue upon several matters at once, and that it is in other respects uncertain, &c.

Joinder in demurrer.

Mr. Hutton, with whom was Mr. Nelson, Q. C., in support of the demurrer.—First, with respect to the replication, it is clearly bad, for the causes assigned. A party must traverse the allegations of his adversary in the words of the adversary's pleading, and not translate that pleading. In this case, the plaintiff does not traverse the identity of the promises, or the acceptance of the monies in satisfaction of these promises, but he draws a conclusion from the plea, and he then traverses

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the conclusion which he draws : this he cannot do ; *Williams v. Price* (a), *Talbot v. Woodhouse* (b). Every plea must be direct, and not argumentative ; *Co. Lit.* by *Hardy*, 303 ; *Bac. Ab. T. Pleas*, I. 5 ; *Rex v. Bury* (c) ; *Com. Dig. T. Plead. G. 1 & 8* ; and in *Bedell v. Lull* (d), it is laid down that a traverse should be in the words of the plea.—[BURTON, J. You had better shew that the plea is not open to general demurrer.]—The case of *Purdon v. Purdon* (e) establishes the sound principle of the plea, viz., that payment by one enures for the benefit of the co-obligors ; so, where there are joint promises, payment by one enures for the benefit of all ; and a recovery against one and payment, is a discharge for all ; *Com. Dig. T. Exon. H.* In the case of bonds, it might be contended that this should appear by the record, and not by matter *in pais* ; but this is not so in assumpsit ; *Drake v. Mitchell* (f). Surely, satisfaction by one is satisfaction as against all, whether the party pays or there is a recovery and levy against him. In *Drake v. Mitchell*, which was an action of covenant, it is taken for granted that a bill in part payment, by one of several co-covenantors, might have been pleaded as satisfaction of the action, for the benefit of all ; and the principle upon which they are decided is this, that the debt has been satisfied ; *Crawley v. Lidgate* (g) : which case decides also, that if a person pay under execution, that payment may be relied on by a co-contractor in his plea ; and that being admittedly the case, I cannot see how this plea is objectionable.

Mr *Napier* and Mr. *John F. Walker*, *contra*.—This plea is bad on general demurrer. Where two persons are jointly liable, the creditor may take part from one without discharging the other ; *Watters v. Smith* (h) ; *Field v. Robins* (i). Another class of cases are those of sole liability, where a smaller sum cannot be pleaded as received in discharge, or operate as a satisfaction of a larger sum, unless under peculiar circumstances ; and there is nothing of that sort disclosed upon the plea in the present case. *Fitch v. Sutton* (k) ; *Cumber v. Wane* (l) ; *Thomas v. Heathorn* (m). As in the last of these cases, the plea in the present case does not shew that there is not more due than is stated in the plea. It is, moreover, a plea of a verdict, and not of a judgment, and is therefore bad as a plea in bar ; and it is a plea of a sum of money recovered in a former action, and it does not aver that the sum mentioned therein was received in satisfac-

(a) 3 B. & Ad. 695.

(e) 2 Anders. 178.

(c) 1 H. & B. 229.

(g) Cro. Jac. 338, 342.

(i) 3 Nev. & P. 226 ; S. C. 8 A. & E. 90.

(l) 1 Str. 426 ; S. C. 1 Smith's L. C. 147.

(b) 2 Lutw. 1480.

(d) Yelv. 151.

(f) 3 East, 251.

(h) 2 B. & Ad. 889.

(k) 5 East, 229.

(m) 2 B. & C. 477, 480.

tion of the promises mentioned in the declaration in this case. With respect to the second branch of the case, the replication, we contend, is sufficient. It is not, we admit, a traverse in the words of the plea, but it is sufficient if, by necessary inference, it answers the plea. *Stephen's Pl.* 236; 1 *Saund. R.* 312^d, note (4). It is also good upon the ground that it supplies an averment necessarily implied in the plea, and then traverses the whole defence; 2 *Saund. R.* 9; *Gilbert v. Parker* (a); *Kelly v. Cullinan* (b); *Perreau v. Bevan* (c); *Farley v. Briant* (d); and as this is not introducing new matter, the conclusion of the replication is correct. No other issue could have been sent to the Jury which would have been material. Again, this traverse is good as a cumulative traverse, which may include several facts going to make up one connected proposition; *Purdon v. Dickson* (e); *Brogden v. Marriott* (f); *Webb v. Weatherby* (g); *Selby v. Bardons* (h); neither is it bad for duplicity, as *Robinson v. Raley* (i) and *Crogate's case* (k) clearly establish; nor does it send a mere issue of law to a Jury, but law mixed with facts, to which there can be no objection. *Stephen. Pl.* 234; 1 *Saund. R.* 23, n. 5. The cases of *Doun v. Hatcher* (l) and *Wright v. Acres* (m) were also cited and relied on: and *Reynolds v. Blackburn* (n) to establish, that if a bad plea provokes a replication, bad for duplicity, the defendant cannot demur; and *Power v. Butcher* (o) for a precedent for the replication in this case.

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Mr. Nelson, Q. C., replied, and was proceeding to contend that the replication consisted of two facts, on one or other of which the defendant must take issue, when—

Per Curiam.—We wish you to sustain your plea, as we do not think that it states that the plaintiff accepted the sum therein mentioned in satisfaction of what he now claims; although the plaintiff in his replication, as appears to us, seems to have kept open to himself the opportunity of shewing that the promises were not identical.

Mr. Nelson, in support of the plea, relied upon *Brown v. Wootton* (p) and *Wilkinson v. Byers* (q), and particularly the judgment of Parke, J., in the latter case.

(a) 2 Salk. 629.

(b) 3 Ir. Law Rep. 68.

(c) 5 B. & C. 306.

(d) 5 Nev. & M. 42.

(e) 2 Ir. Law Rep. 351.

(f) 2 Scott, 703; S. C. 2 Bing. N. C. 473.

(g) 1 Scott, 477; S. C. 1 Bing. N. C. 502.

(h) 3 B. & Ad. 2.

(i) 1 Burr. 316.

(k) 8 Rep. 66, b.

(l) 10 Ad. & E. 121.

(m) 6 Ad. & E. 726.

(n) 2 Nev. & P. 136.

(o) 5 M. & Ry. 327; S. C., 10 B. & C. 329.

(p) Cro. Jac. 73.

(q) 1 Ad. & E. 106.

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 DRUMMOND.

BURTON, J.,* this day (23rd Nov.) delivered the judgment of the Court. After stating the declaration and plea, his Lordship said, that the important part of the latter was the allegation that "the said Thomas Hayes paid "and satisfied unto the said plaintiff the further sums of £350. and 6d., "so assessed by the said Jury for the said plaintiff, as aforesaid; and that "the said plaintiff then and there accepted the same in satisfaction and "discharge of the said damages, costs and expenses, which had been so "assessed to him as aforesaid, and this he was ready to verify." To this plea the plaintiff replied, "that he did not accept and take the said "monies, &c., in satisfaction and discharge of the said causes of action "against the defendant in the said declaration above alleged;" and this replication concluded to the country. To this replication the defendant demurred, upon the ground that it was faulty in this respect—that it did not take issue upon the averments in the plea, but upon new matter introduced into the replication; and also that it concluded to the country, when it ought to have concluded with a verification. However, upon full consideration of this case, it appears to us that the plea in this case is bad, and cannot be sustained; the plaintiff's action proceeds upon an assumpsit to him from the defendant; and the defendant's answer is not that the plaintiff's action, or the assumpsit on which he proceeds, has been paid or satisfied, but that the assumpsit was not made by the defendant alone, but by the defendant conjointly with one Thomas Patrick Hayes; and that the plaintiff brought an action against Hayes alone, and obtained a verdict for a certain sum in that suit. Unquestionably this plea might have been framed so as to afford an answer to the plaintiff's demand, if it had proceeded with proper averments. But the plea merely states a termination of suit, which is nothing more than satisfaction to the extent of the sum then recovered, that is—nothing more than that the plaintiff recovered in that suit a certain sum in satisfaction: and the question is, in satisfaction of what was that sum recovered? It appears by the plea that this sum was recovered not in satisfaction of the sum mentioned in the plea as the sum for which the action was brought; the sum recovered is, therefore, a sum that might be less than the plaintiff's cause of suit or demand in that action; but that it was recovered in satisfaction of the exact sum recovered in that action: and, moreover, there is no averment whatever that this sum recovered was in satisfaction of the sum for which the plaintiff has brought his present action. But take this plea as accord and satisfaction, it is insufficient—for one of these persons might be surety for another, or both for a third person; and cases have been cited by plaintiff's Counsel, which prove that a party may proceed against one of several persons jointly liable to him for his proportion of the debt, and afterwards proceed for the remainder of his

* This case was argued before Lord Chief Justice Pennefather took his seat upon the Bench.

demand against the others. It is clear, therefore, that, the plea in order to amount to a bar of the plaintiff's action, ought to have averred the acceptance of the sum mentioned therein in satisfaction of the plaintiff's demand both against Hayes and the defendant. It then appears that the plaintiff, instead of demurring, replied, and no doubt the replication is bad for the reasons assigned; but the demurrer must be overruled, the first fault being in the defendant's plea.

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Demurrer overruled.

MICHAEL BARRY,
Assignee of DANIEL BARTHOLOMEW FOLEY,

v.

Sir JOSEPH WALLACE HOARE, Bart.

June 8.

"WHEREAS Daniel Foley, of the City of Cork, gentleman, in the Court of his late Majesty *George* the Third, in Trinity Term, in the fifty-eighth year of the reign of the said late King, before said late King, at the King's Courts Dublin, by bill without writ of said late King, and by the judgment of the said Court, did recover against the said Sir Joseph Wallace Hoare, Baronet, as well a certain debt of £764. 19s. 8d. sterling, by the acknowledgment of the said Sir Joseph, as £2. 14s. 4d. of the like money, which to the said Daniel in said Court were adjudged for his damages, which he sustained as well by reason of the detention of the said debt, as for his expenses and costs by him laid out about his suit in that behalf, whereof the said Sir Joseph is convicted, as it appears to us of record, and which said debt has not yet been paid. And the said Daniel is since dead; and afterwards D. B. Foley, administrator of the said Daniel deceased, by his deed, duly executed the judgment debt and damages, according to the form of the statute, &c., to Michael Barry transferred and assigned, as by the memorial and record of same in our Court before us remain and appear, as we have received information from the said Michael in our Court before us, and because the said Michael hath

In a *scire facias* at the suit of the assignee of the personal representative of the conusee, the writ, after stating the recovery of the judgment, proceeded, "And the said D. F. (the conusee) is since dead, and afterwards D. B. F., administrator of the said D. F. deceased, by his deed duly executed the judgment debt and damages aforesaid, according to the form of the statute in such case made and provided, to M. B., the plaintiff, transferred and assigned,

as by the said memorial," &c. :—*Held*, upon special demurrer to this writ—*first*, that it was not necessary to state in the writ the time of the death of the conusee; *secondly*, that it was sufficiently shewn that the assignment was executed after the death of the conusee; *thirdly*, that it sufficiently appeared that administration to the conusee was obtained before the execution of the assignment, the document therein, amounting to this, that D. B. F. *being* administrator, assigned; *fourthly*, that the same statement supplied the want of an averment that the conusee died intestate, as it imported that D. B. F. was the legal administrator of the conusee, and whether he was so to an intestate, or administrator with the will annexed, is not material; and where the administration is not granted to the plaintiff, but to the party through whom he derives, it is not necessary to make *profert* of the letters of administration, or set out the particulars thereof; *fifthly*, that it was not necessary to make *profert* of the assignment, the memorial *being* the assignment; and *sixthly*, that it is not necessary to specify the time of the entry of the memorial upon the roll.

O

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"besought us for a fit remedy to be provided for him in that behalf, and
 "we, willing that justice be done therein, do command you, as we formerly commanded you, that by honest and lawful men of your bailiwick
 "you cause to be made known to the said Sir Joseph, that he be before
 "us at the Queen's Courts on the 15th day of April next coming, to
 "shew if he hath or knoweth any thing to say for himself why the said
 "Michael should not have his execution against him for the debt and
 "damages aforesaid, according to the force, form and effect of the
 "remedy, recovery and assignment aforesaid, if he shall see it expedient
 "for him; and further to do and receive what our said Court before
 "us shall then and there consider in that behalf, and have you then
 "there the names of those whom you shall cause it to be made known
 "to him, and this writ. Witness, &c., at the Queen's Courts."

To this writ the defendant demurred specially, and assigned the following causes of demurrer:—"That it does not appear by the said writ
 "when the said Daniel Foley died, or that he died intestate or before the
 "execution of the said deed of assignment, nor that the said Daniel
 "Bartholomew Foley ever obtained letters of administration to the said
 "Daniel Foley, or at what time or from what Court he obtained such
 "letters of administration, or what sort of letters of administration he
 "obtained, or that he obtained them before the execution of said deed
 "of assignment or after the death of said Daniel Foley; nor is it stated
 "in said writ that the said Daniel Bartholomew Foley was administrator
 "of said Daniel Foley, and that it is not stated in said writ, nor does it
 "appear thereby, that any memorial of the deed of assignment in said
 "writ of *scire facias* mentioned was entered in roll of parchment or
 "vellum kept for that purpose in the office where said judgment was
 "entered, or that said judgment was entered in any Court, or that said
 "memorial was perfected after the death of the said Daniel Foley, or
 "whether it was perfected before or after administration granted to the
 "said Daniel Bartholomew, or upon what day such memorial was perfected, or whether said memorial was perfected by said Bartholomew
 "Foley, or was under seal, or that any memorial of said assignment was
 "perfected pursuant to the statute or otherwise, or that any entry of
 "such memorial was made on any roll; and that no *profert* is made of
 "said deed of assignment, nor is it stated whether same exists or is lost,
 "and that said Michael has not by said writ shewn any title to revive said
 "judgment, or to take out execution thereon in his own name, and that
 "said writ of *scire facias* is in other respects uncertain, informal, and
 "insufficient."

Joinder in demurrer.

Mr. Lane, in support of the demurrer.—One set of the objections relate to Daniel Foley, the others to Daniel B. Foley; and with respect

to the causes of demurrer as to the memorial of the assignment, I will not argue them; but with respect to Daniel Foley, the only averment is, that he is dead, not that he died before the assignment of the judgment; nor is it stated that he died intestate. In 1 *Chitty Pl.* 287 or 289, it is laid down that a time must be stated when every material and traversable fact happened. There is no authority precisely in point as to the present objection; but the cases most analogous to this occur where an executor sues for rent which accrues due; and in such cases it has been decided that the time of the testator's death must be shewn. Secondly, with respect to the averments as to D. B. Foley—in the first place, it is not stated that he was administrator of Daniel Foley; secondly, the nature of the administration is not stated; thirdly, no time is stated; fourthly, it is not stated that administration was obtained before assignment. In *Fletcher v. Pogson (a)*, which was a *scire facias* against bail, the declaration, after reciting the recognizance, and that the plaintiff in the original action became bankrupt, and that the plaintiffs in the *scire facias* were chosen his assignees, and then proceeded—"Now, on behalf of the plaintiffs, as assignees as aforesaid," without stating any assignment, it was admitted that the omission was a good ground of demurrer to the declaration. All the assignments should be set out. In *Purdon v. Purdon (b)*, and in *Malcomson v. Gregory (c)*, both assignees were put upon the record; and so, in every case, the previous assignment must be referred to. The precedent given in 2 *Chitty's Pl.* 592, states the testator's will and the appointment of the executors; and the same form is followed in 2 *Chitty's Pl.* 128, the precedent of a declaration by the indorsee of an executor; and in 9 *Went. Pl.* 555, 558, the forms of declaring by an administrator with the will annexed, and by an executor of an executor, are given, setting out these particulars. Would it be sufficient to say, "A. B., assignee of the administrator of —, assigned," &c.? Moreover, no one could assign this judgment but one who had a prerogative administration; and that would be a sufficient reason for requiring the plaintiff to shew upon the record the nature of the administration in this case. In this country, a *scire facias* is in every respect analogous to a declaration, and should be governed by the same rules, and subject to the same strictness as regulates that form of pleading.

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Mr. Napier and Mr. Orpen, *contra*.—With respect to the first objection, that it does not appear when Daniel Foley died, that was one of the points of demurrer in *Henry v. Kelly (d)*, and was overruled. As to the second objection, that it does not appear he died intestate, that is an indirect

(a) 3 B. & C. 192.

(b) 1 Hud. & B. 229.

(c) 1 Hud. & B. 14.

(d) 2 Hud. & B. 591.

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objection to the grant of administration, which is the act of a Court of competent authority; and upon that ground the objection is untenable; *Vin. Ab. T. Executors* (Z. a, 6), pl. 41; *Noy*, 137; *Pearson v. Archdekin* (a); and with respect to the third objection, it is sufficiently averred that the assignment was executed after the death of Daniel Foley, by the words "afterwards D. B. Foley, administrator of the said Daniel deceased, &c., assigned;" and this objection, and also the objection as to when or in what Court letters of administration were obtained, or that they were obtained before the assignment, are all answered by the case of *Bruce v. Cooke* (b). The only real ground of objection is as to the statement of administration. It is necessary, first, to consider the nature of a *scire facias*. In *Blackston v. Martin* (c), Jones, C. J., said—"A *scire facias* is in the nature of a bill in Chancery, and for this, such certainty "is not expected as the common law requires; and all *scire facias*'s are "in such a manner, and if it be otherwise, it ought to come from the "other side. And for this, because the constant course is so, he concluded "for the plaintiff." In this opinion the other Judges agreed, and that the proper form of a *scire facias* is regulated by precedent and course of the Court. The *Earl of Shrewsbury v. Lewson* (d), which was a *scire facias* in Chancery by plaintiff as administrator, upon a recognizance of £4000, conditioned for the performance of covenants. An objection was taken for want of *profert* of letters of administration—"But because it "was in a writ founded on the record, and the course is not to mention "it in writs, and so be all the precedents in the Chancery, it was, therefore, "ruled to be well enough." In *Morgan v. Odium* (e) the *scire facias* stated, that the conusor died seized of certain lands—demurrer, that the estate of which he was seized was not stated—the Court of Exchequer first allowed the demurrer, but afterwards, on considering the precedents long in use, they overruled it. So also in *Henry v. Kelly*, Bushe, C. J., in answer to one of the objections in that case to the form of the *scire facias*, said—"But that is, and has been as long as can be traced, the constant form known and used in this country;" and a similar answer was given to a like objection by the Court of Exchequer in the *Attorney-General v. Sirr* (f). The case of *Henry v. Kelly*, when properly considered, rules the present case. In strictness of pleading, it should have appeared in that case—that J. Cooke made a will—that he appointed T. Harrick his executor—that he obtained probate in the Prerogative Court, and that he assigned the judgment as executor; yet that precedent was held good on special demurrer, as according to

(a) 2 H. & B. 570.

(b) 1 H. & B. 318.

(c) Latch. 112; S. C., Sir W. Jones, 90. (d) Cro. Eliz. 592.

(e) 1 Al. & N. 300, note.

(f) 2 Law Rec. N. S. 142.

the course of the Court. It was admitted that an executor may assign effectually before probate, although an administrator cannot before administration; but an executor must do so *as* executor. An assignment by him *suo jure* would not bind him in his representative capacity: *Com. Dig. T. Estoppel*, note *a*; the same principle is stated in 1 *Phil. on Ev.* 398. Therefore, unless the *scire facias* in *Henry v. Kelly* be read as stating an assignment by Harrick *as* executor, it would be defective. Why that should be considered as its real construction will appear by a reference to the statute (9 *G.* 4, c. 5, ss. 1, 2) enabling conusees and their representatives to assign judgments. There is, first, the deed of assignment; and, secondly, the memorial (the record) of the assignment which contains every thing essential; and the memorial "is conclusive evidence of the assignment, and of the facts contained in the assignment;" and it must decide whether the assignment was made by D. B. Foley as administrator, or in his own right; and it is conclusive as to that: for every essential allegation is recorded, and by that alone is to be established. This has been expressly laid down by Burton, J., in *Maguire v. Armstrong* (*a*), and he afterwards proceeds to shew that unless the memorial contains the statutable requisites, there is no valid assignment. It is, therefore, by the memorial that the validity of the assignment is to be tried. Where the plaintiff claims through a personal representative of the conusee, it must appear on the memorial that that person was personal representative, otherwise there would be no valid assignment. The Officer is bound to see that it is a valid assignment before he enrols it. In *Anonymous* (*b*) there was an application to the Court for directions to the Officer, where he refused to enrol an assignment executed only by one of three executors of the conusee; and in *Lee v. Macarty* (*c*), there was a similar application to the Court. The Court will presume that the Officer has done his duty, and that unless the present assignment was by the administrator *as such*, the memorial would not have been received; and we have a right to assume that it was executed by a party capable of making a valid assignment. In *Hobhouse v. Hamilton* (*d*), Lord Redesdale said—"He was of opinion that by the true construction of the act, the party is bound and concluded by what appears on the record, although the assignment might have been forged,—and that payment to the assignee on record would be good payment;" we are the assignee upon record, and if payment to such assignee is good, what right has a party to set up a defence, which, not denying his own liability, or making any claim of right, or any objection of merits, impeaches a matter of record; and does that on mere possibility? Any objection of the kind relied on should

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(a) 1 H. & B. 317, *note*.

(b) 3 Law Rec. O. S. 275.

(c) S. & B. 96.

(d) 1 Sch. & L. 208.

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be made by plea. It may be further remarked, that this is not the pleading of Counsel—the writs are all prepared in the office, and this is the form in use for a long time, and always sanctioned by the Court. It does not appear that there was any other *bonum notabile* except the judgment, and, therefore, it must be presumed that administration was granted in Dublin; *Huthwaite v. Phaire* (a); and, at all events, any objection for not shewing the Court by which administration was granted is for plea; *Stokes v. Bate* (b). The Court will make every presumption against captious objections; *Pugh v. Robinson* (c), and *Kaye v. Rolin* (d). There are no English precedents, as there is no statute in England analogous to the Irish act, upon this subject.

Mr. Lane, replied.

Nov. 24.

BURTON, J., this day delivered the judgment of the Court.

After reading the *scire facias*, and also the special causes of demurrer, his Lordship said, that the first cause of demurrer to the *scire facias* was for not stating the time when the death of the conusee of the judgment took place. Generally speaking, the time of the death of the conusee is not material in a *scire facias* by the assignee, and there is nothing in this case which appears to make it so, and its omission is, therefore, no ground of demurrer to this writ, as it would not be a ground of demurrer to a declaration. It was objected in the next place, that it was not shewn in the writ that the assignment was executed after the death of Daniel Foley; but that is sufficiently averred in the writ, which, after stating the recovery of the judgment, proceeds—“And the said Daniel is since “dead, and afterwards D. B. Foley, administrator of the said Daniel “deceased, by his deed duly executed the judgment debt and damages “aforesaid, according to the form of the statute in such case made and “provided, to Michael Barry transferred and assigned, as by the said “memorial,” &c. The next objection was, that it was not shewn by the writ that administration was obtained before the execution of the assignment; but that is also sufficiently supplied by the averment in the *scire facias*, that D. B. Foley, administrator of the said Daniel, assigned, &c., which amounts to this, that D. B. Foley, being administrator of Daniel, assigned to the plaintiff. The next objection was, that it was not averred in the *scire facias* that the conusee died intestate, but it is sufficiently shewn in the passage just referred to, that D. B. Foley was administrator of Daniel, which imports that he was legal administrator; and whether he was so to an intestate, or administrator with the will annexed, is not

(a) 1 Scott's N. C. 43.

(c) 1 T. R. 117.

(b) 5 B. & C. 498.

(d) 6 T. R. 134.

material. The administration not being granted to the plaintiff, but to the person through whom he derived, he is not required to make *profert* of the letters of administration; and in the case of a derivative administration it is not necessary to set out the particulars, as a denial of the party's being administrator at the time of assignment would have put all these matters in issue. The whole of that proposition is expressed in *Barnes' Notes*, 167, that it is not necessary in the case of a derivative administration to set out these particulars. The remaining causes of demurrer are objections as to the statement of the assignment; the assignment is in these words:—"the said, &c., by his deed duly executed the "judgment-debt and damages aforesaid, according to the form of the "statute in such case made and provided, to Michael Barry, transferred "and assigned, as by memorial and record remaining in our Court, &c., "appeared." The defects alleged by the demurrer to lie to this statement are as follows: here his Lordship repeated the several causes of demurrer assigned to this part of the *scire facias*, and said—as to the objection that there is no *profert* of the assignment, or averment that it was lost, that is answered by the case of *Maguire v. Armstrong*, in which it was held that the memorial was the *assignment*; and with respect to the statement of the time of entry of the memorial upon the roll, that objection was taken by demurrer in *Henry v. Kelly*, and overruled; and that objection was also, as were the other objections taken to this part of the writ in this case, relied on and overruled in *Bruce v. Cooke*: and it appears to me perfectly plain that a denial by plea of *nul tiel* record puts all valid objections upon the record in issue; and that, therefore, upon these grounds the demurrer ought to be overruled.

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Judgment for the plaintiff.

ANONYMOUS.

Nov. 24.

MR. KINAHAN applied in this case to have the name of a burgess struck off the burgess roll. The application was made under the 50th section of the 3 & 4 Vic. c. 108, which gives an appeal to this Court against the decision of the Revising Barrister; and allows the right of the party to be on the roll to be objected to in the manner provided in respect to freemen, under the 9th section of the same statute.

The appeal given under the 50th section of the 3 & 4 Vic. c. 108, against the right of a burgess to remain upon the burgess roll, being a proceeding

analogous to an application for an information in the nature of a *quo warranto*, cannot be moved within the last four days of Term.

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ANONYMOUS

Per Curiam.

This application is analogous to a motion for liberty to file an information in the nature of a *quo warranto*, and is therefore subject to the rules which relate to a proceeding of that kind; and for that reason it cannot be made within the last four days of Term.

No rule.

ANONYMOUS.

Nov. 25.

It is an inflexible rule of this Court, that an affidavit for liberty to issue a *scire facias* to revive a judgment, if the judgment be over twenty years old, must specify the particulars as to the payment or payments of interest relied on; viz., where, when, by whom and to whom, the payment or payments were made.

THIS was an application to revive a judgment; the judgment was more than twenty years old, and the affidavit stated generally that payments of interest had been made to a recent period on foot of the judgment.

PENNEFATHER, C. J., said the affidavit was defective in not stating the particulars of the payments of interest, which were relied on as keeping the judgment alive. He begged it would be understood for the future, that when applications of this nature were made, and the judgment was over twenty years old, the Court would require that the affidavit should specify the particulars of the payment or payments of interest relied on—the sum or sums paid—where and when, and by whom and to whom, such payment or payments were made. He wished this to be understood as a general and inflexible rule.

No rule.

STEPHEN CRAWFORD,

v.

ROBERT LEA M'DONNELL and CHARLES DEVINE.

SAME v. Rev. CHARLES M'DONNELL.

Nov. 25.

It is no irregularity to include more than one defendant in a *capias*, and declare against them separately afterwards.

THIS was an application to set aside the proceedings in these causes for irregularity; upon the ground that the two defendants in the first cause were included in one *capias*, and three declarations filed against the

The notice of motion to set aside proceedings ought to state on whose behalf the motion is made.

defendants, for the same cause of action, viz., a bill of exchange to which they were parties; and as to the third defendant, upon the ground that he was not served with the *capias*. The notice of motion was only entitled in the first cause. The affidavit of Luke Byrne, the process-server, stated that on the 5th of November he personally served the defendant with the writ or process and the notice at foot, by delivering unto and leaving with the defendant in Christopher M'Auley's shop in Fleet street, in the city of Dublin, a true copy, &c. The Rev. Mr. M'Donnell, in his affidavit, deposed "that he positively saith that he "never was personally or at all served, *as sworn to by the said Luke "Byrne;*" and added, that he had made diligent search, and that no such person as Christopher M'Auley lived in Fleet-street; and that the three actions were brought for the recovery of the amount of one bill of exchange.

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Mr. *Bowen Thompson*, in support of the application, relied upon the facts stated in the affidavits.

Mr. *Rogers*, on the other side, said as to the defendant Robert Lea M'Donnell, he had given a plea of confession by another Attorney, in the action brought against him, and he was, therefore, out of the present application. And with respect to the objection that Devine is included in the same *capias* with Robert Lea M'Donnell, there is no objection whatever to such a proceeding. In *Yeo. & Bil. Pr.* 64, it is said that "The names of four defendants may be included in one writ of *capias* "*ad respondendum*; and it is not necessary that the cause of action "should be joint, because four are inserted; for the plaintiff may join "four defendants in one writ for four different and several causes of "action, and afterwards declare against all or as many of them as he "pleases; the writ being thus considered merely process to bring the "parties into Court." And with respect to the third defendant—his swearing to not having been served with the process is mere quibbling founded upon a mistake into which the process-server fell, in stating Mr. M'Auley's shop to be in Fleet-street, instead of Temple-bar.

PENNEFATHER, C. J.

This motion cannot be sustained upon any of the grounds relied on. With respect to Robert Lea M'Donnell, he has given a plea of confession in the action brought against him; and, therefore, so far as he is concerned, this motion is perfectly nugatory. Secondly, so far as respects the Reverend defendant, the application on his behalf must be refused upon the grounds of the special pleading in his affidavit. Thirdly, in this

M. T. 1841. case there is no ground whatever for the objection, that two of the
Queen's Bench defendants were included in the same *capias*.

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CRAMPTON, J.

M'DONNELL.

There are two objections to the notice of motion in this case; first, that it is not made on behalf of any person—either on behalf of the defendants generally, or of any one defendant. Secondly, there are two distinct causes in Court, and the notice of motion is only entitled in one. The practice is not, as stated by Mr. Thompson, to include only one defendant in a *capias*; but it is laid down in Mr. *Ferguson's Practice** that several defendants may be included in the same *capias*.

Motion refused with costs.

* The following is the passage to which his Lordship referred:—"In the Common Pleas and Queen's Bench there is no limit to the number of defendants which may be inserted in the *capias*; but in the Exchequer it appears to be unusual to insert the names of more than four defendants, a course which certainly is not conformable to the principles of law, which require all defendants who are to be jointly sued, to be named in the one writ commencing the proceedings; but in point of practice it appears of little importance, as the defendants, however brought into Court, when once there, may be proceeded against, according as their liability is joint or several. And, furthermore, in the practice of the Exchequer it is not unusual or improper to join in the one common law subpoena four defendants, against each of whom the plaintiff may have a different cause of action."—1 *Fer. Pr.* 127, 128.

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(*Common Pleas.*)

Hilary Term.
Nov. 5.

THIS was an action of special assumpsit.—The declaration contained two counts. The first count stated that one John Daly was tenant to the plaintiff for a house and premises, and was indebted to the plaintiff as landlord in a certain sum of money, to wit £10. 10s. for rent payable out of said premises, and due by the said John Daly; and that while the said rent was owing and continuing to be due, the said plaintiff distrained certain goods and chattels for a distress, and which goods and chattels so distrained were in value worth more than the amount of said rent, and said plaintiff continued in the possession of the said distress, and while he was in possession under and by virtue of said distress, and was entitled to sell and dispose of the same according to law, the defendant, in consideration that the plaintiff would forbear to sell, and would give up the said goods to the said John Daly, and would forego his right to continue the said distress, promised the plaintiff that he would, within a certain period of time which was to expire on the 1st of January 1841, pay to the plaintiff the amount of the said rent, and that the plaintiff, relying on the said promise of the defendant, and at the request of the defendant, withdrew the distress, and gave up to the said John Daly the goods and chattels so distrained on, and gave up and abandoned the right to continue the said distress, and to sell the said goods and chattels for payment of the said rent, of all which the defendant had notice, and the said period, within which the defendant promised to pay him, the plaintiff, the amount of the rent, had elapsed, and yet the defendant had not paid the same or any part thereof to the plaintiff, although often requested, nor has any other person paid the same, but the entire thereof is still due and unpaid.

The second count stated, that one John Daly was tenant to the plaintiff of a certain dwelling house, and was indebted to the plaintiff as landlord in the sum of £10. 10s., and while the said rent was due, the plaintiff distrained goods on the premises worth more in value than the amount of said rent, and being in possession under and by virtue of said distress, the defendant, in consideration that the said plaintiff would forbear to sell the said goods and chattels for the said rent, and give up the said goods and chattels to the said John Daly, and would forego his right to continue the said distress, promised the plaintiff, that in case the said John Daly did not pay the plaintiff the said rent on or before the 1st of January 1841, the said defendant should and would pay the same to the said plaintiff *upon request*; and the plaintiff averred that, relying on the said promise, and at the request of the defendant, he withdrew the distress

The plaintiff having distrained the goods of his tenant, the defendant undertook to pay the amount of the rent in consideration of the discontinuance of the distress; and the distress having been thereupon withdrawn and the goods left in the hands of the tenant—*Held*, that the promise of the defendant was a collateral promise, and that the absence of an averment of default in the principal in one count, and of a special request in the other, in which the promisee to pay was stated to have been upon request, were fatal objections to the declaration on special demurrer.

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and gave up to the said John Daly the goods and chattels so distrained, and gave up and abandoned his right to continue the said distress, and to sell the said goods and chattels for payment of the rent, of all which the defendant had notice; and the said John Daly did not pay the said rent or any part thereof on or before the said 1st day of January 1841, or at any time whatever; and yet the said defendant has not paid the same, *although often requested*, nor has any person paid the same, but the entire thereof is still due and unpaid.

To these counts the defendant demurred specially. As to the first count; first, that it averred no good consideration in law; secondly, that it averred no sufficient performance on the part of the plaintiff of the consideration averred, and that such performance was insufficiently stated; and thirdly, that the promises of the defendant appear by the said first count, to be collateral, and in the nature of a warranty, and there is no averment of any default of the principal debtor.

As to the second count—the first and second grounds were the same as the two first grounds of the preceding count; and thirdly, because it appears by the said second count, that the promises of the defendant were to pay as a surety, on default of the principal debtor to the plaintiff upon request, and there is no averment of any request by the plaintiff.

Mr. *Michael Barry*, in support of the demurrer.—In reference to the two first causes of action, which are applicable to both of the counts of the declaration, there is, in the first place, no legal consideration in law to support the assumpsit. Forbearance, which is the apparent consideration, must be for a specified period, or for a reasonable time, whereas in this declaration it is indefinite; *Baker v Jacob* (a); *Chitty on Cont.* 38. Moreover, the party who has been induced to forbear must have a legal claim for the demand forborne, at the time of the forbearance, *Barber v. Fox* (b); and there is nothing on the face of the declaration to shew that the distress made was a legal one.—[TORRENS, J. Does not the relation of landlord and tenant appear, and the averment that rent is due?—That is not sufficient; for a non-compliance with any of the requisites of the 6 & 7 W. 4. c. 75 s. 6, makes the landlord a trespasser.—[TORRENS, J. He need not state more in his declaration than would be required in a general avowry.]—If there is any thing in the consideration averred, it is the abandonment of the distress; for the return of the goods is not of service to the defendant, or of detriment to the plaintiff: the right to distrain still continues, and could not be extinguished by parol.—[BALL J. It is to forego his right to continue the distress made, not to forego his right to distrain, and when he gives up the goods, he does what he has undertaken.]—I come then to the main objection contained

(a) 1 Bulst. 41.

(b) 1 Stark. 270.

in the third cause of demurrer to the first count, viz., that this was a collateral undertaking, and that there is no averment of a default in the principal. The debt is the debt of the tenant; and where a defendant comes in aid of another, so that there is a remedy against both, the undertaking is collateral; *Birkmyr v. Darnell* (a); *Kirkham v. Martin* (b). There is nothing on the face of the declaration to shew that the debt of the tenant was extinguished—nothing to shew his discharge from liability; and this case, therefore, comes within that class of cases, that on a promise to discharge the debt of another, which is not thereby extinguished, the surety is entitled to a notice of the default of the principal; *Fish v. Hutchinson* (c); *Batesby v. Brooksbeck* (d); and in the case of *Morris v. Clewsby* (e), Lord Ellenborough lays it down that, where the form of action makes it necessary to declare upon the guarantee, an application to the principal must be stated on the record. On the other side the cases of *Williams v. Leaper* (f), and *Edwards v. Kelly* (g), will be relied on; but they are very distinguishable from this case, inasmuch as in them the goods distrained, and which were liable, were delivered up to the party promising, whereas in this case the goods under distress were returned, not to the defendant, but to the tenant. This distinction is recognised in *Thomas v. Williams* (h), and confirmed by the opinions of the Judges in *Tomlinson v. Gell* (i).

As to the third cause of demurrer to the second count, viz., that on the face of it, the pleader has relied on a collateral undertaking of the defendant to pay, as a surety, on the default of the principal debtor, upon request, and there is no averment of any request by the plaintiff. Such an actual request, under such circumstances, is absolutely necessary, and the declaration must aver it distinctly and specially; *Birks v. Tippetts* (k); for where a defendant is chargeable on a collateral promise, the general allegation of *licet scipius requisitus* is not sufficient; *Selman v. King* (l); *Hill v. Wade* (m).

Mr. *Whiteside* and Mr. *O'Leary* against the demurrer, were directed by the Court to confine themselves to the third cause of demurrer on each of the counts.

The declaration demurred to is a fac-simile of the precedents in 2 *Went. on Plead.*, and in the case of *Barrell v. Trussell* (n). The sole foundation

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(a) 1 Saik. 27.

(b) 2 B. & Al. 613.

(c) 2 Wils. 94.

(d) Cro. Jac. 500.

(e) 4 M. & S. 574.

(f) 3 Burr. 1806; S. C., 2 Wils. 302.

(g) 6 M. & S. 204.

(h) 10 B. & C. 664.

(i) 6 Ad. & El. 564; S. C., 1 N. & P. 588.

(k) 1 Saund. 31.

(l) Cro. Jac. 183.

(m) Cro. Jac. 523.

(n) 4 Taunt. 117.

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on which the argument of the other side rests is, that this was a collateral undertaking; but it has been expressly decided, that it is an original undertaking on the part of the defendant; *Williams v. Leaper*; *Edwards v. Kelly*. The defect of their argument lies in the assumption, that after the distress the tenant still continued liable for the rent; and no case has been cited to shew, that while the goods were under distress, there was a debt owing by the tenant to the plaintiff, for which he might have been sued pending the distress. Therefore, no debt being due by the tenant at the time of the distress, or, as Baily, J., expressed it in *Edwards v. Kelly*, "the debt being suspended at the time the promise was made," the undertaking could not have been to pay the debt of another, and was, therefore, original and not collateral. And in the same case Holroyd, J., expressly states, that "If debt were brought for the arrears "while the goods were under distress, the tenant might plead the distress "in answer, which shews that the debt was for the time suspended, "and the consideration for the promise was a fresh consideration, not "merely moving to the tenant, but to those who made the promise to "pay a debt which at that time did not exist as the debt of another." This is the true principle on which this case rests. It has been said, that in *Williams v. Leaper* and *Edwards v. Kelly*, the goods were given up to the defendant, and not to the tenant; but nothing was said in those cases about giving up the goods to any person, but merely of desisting from the distress. This case is exactly the same in principle as that of a tradesman, having a lien upon goods in his possession, parts with them on the promise of a third party to pay the demand; and such a promise has been held to be an original promise; *Houlditch v. Milne* (a); *Castling v. Aubert* (b). The consideration is the giving up of the goods in general, and not to any particular person. What matters it in law to whom the property is given, when the consideration is the parting with it? That was a detriment to the plaintiff, on which the promise was made at the time that no debt was due by the tenant. The case of *Thomas v. Williams* recognises and confirms those of *Williams v. Leaper* and *Edwards v. Kelly*, and the conclusion drawn from them in *Chitty on Contracts*, 512, is, that "If the consideration be the creditor's resignation of a lien or "charge on goods, which afforded him a remedy or fund to enforce payment, the case does not fall within the statute."

As to the objection to the second count, on the ground that no special request by the plaintiff to the defendant has been averred—the promise is to pay within a particular period, viz., the 1st of January 1841, which had passed at the time of filing the declaration, and, therefore, no special request was necessary, on the same principle, that if the money was to be paid at the plaintiff's house, no special demand need have been

(a) 3 Esp. N. P. C. 86.

(b) 2 East, 325.

alleged. At all events, there is an averment of a request in the declaration, and the Court will infer that it was made by the plaintiff; and their only objection being, that no request was made by the plaintiff, they cannot take advantage of the want of time and place; *Bowdell v. Parsons* (a). In fact, the objection could not be taken on general demurrer, and, therefore, not in the general way in which this special demurrer has been drawn.

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Mr. *Napier*, in reply.—The real and substantial question is, whether the promise in this case was original or collateral. It is treated as collateral by the plaintiff in the second count of his declaration, which makes it in some measure a *felo de se*. All the English precedents and authorities in which promises of this nature were held to be original, were cases in which the defendant had the possession of, or an interest in, the goods distrained; and the goods consequently continued to be the debtor, whereas in this case they ceased to be so by the very contract. The true test of what constitutes a collateral or an original undertaking is the extinction or non-extinction of the intermediate debt. In this case there has been no extinction, and even if a suspension, it was put an end to by the re-delivery to the tenant—for that re-delivery re-vested the plaintiff's right against the tenant; *Lear v. Edmonds* (b); *Hudd v. Ravener* (c); *Lessee Trant v. Fogarty* (d), where the Court stated that a distress without a levy was no satisfaction of the rent due. In *Williams v. Leaper*, and *Edwards v. Kelly*, the defendant got the goods subject to a trust, and became *quasi* bailiff to the landlord. The goods were the fund out of which the rent was to be paid; and the undertaking was to make the common fund available for that purpose. The transaction was a virtual sale of the distress, insomuch that if the goods had been sold, and the proceeds applied for any other purpose, the plaintiff could have maintained an action for money had and received against the defendant; for although paid through the defendant's hands, yet it was out of the tenant's goods. In *Houlditch v. Milne*, on which the Counsel on the other side relies, Lord Eldon considers the possession of the goods as the material point; for he said—"If a person get goods into his possession, on which the landlord had a right to distrain for rent, and he promised to pay the rent, although it was clearly the debt of another, yet a note in writing was not necessary." And in *Castling v. Aubert* a similar principle is laid down by Mr. Justice Le Blanc. The distinction on which we rely will be found in 1 *Wms. Saunders*, 211, c. n. 1; and the same criterion has been adopted in the late case of *Green v. Cresswell* (e).

(a) 10 East, 359.

(c) 5 B. Moore, 542.

(b) 1 B. & Al. 157.

(d) Batty, 15, n.

(e) 2 P. & D. 435.

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With regard to the absence of a special request in the second count, it is clear, that there is no averment of an application to the principal by the plaintiff—and the undertaking being treated as collateral in the count, it is clearly bad. The case of *Bowdell v. Parsons* is not in point, inasmuch as in the first count in that case, there were averments of the defendant's acts which superseded the necessity of a special request on the part of the plaintiff; but nothing of that kind is to be found in this declaration; and in the second count there was the averment which is wanting in this case, viz., that the plaintiff did request of the defendant.

DOHERTY, C. J.

Jan. 31.

This is an action of assumpsit. The declaration contains two counts. The first count states, that on the 6th of April, one John Daly was tenant to the plaintiff, and was indebted to him, as his landlord, in a certain sum for rent; and that on that day, and while the said rent continued due, the plaintiff distrained certain goods and chattels then being on the premises, as and for a distress for the said rent, and which goods were worth more than the said rent; and plaintiff continued in possession of said distress from the 6th to the 9th of April, and was entitled to sell and dispose of the same, for the purpose of satisfying the said rent; and that the defendant, on said 9th of April—in consideration that the plaintiff would forbear to sell the goods and chattels for said rent, and would give up the goods and chattels to John Daly (the tenant), and would forego his right to continue said distress—promised the plaintiff that he the said Richard Collier should and would, on or before the 1st of January 1841, pay the plaintiff the amount of the said rent; and the plaintiff avers, that, relying on said promise, he did then and there, at the request of the defendant, withdraw said distress; and gave up to the said John Daly (the tenant) the said goods and chattels, and abandoned his right to continue said distress—and of all which the defendant had notice; and the said period, within which the defendant promised to pay, has long since elapsed: yet, the defendant has not paid the same, nor any part thereof, although often requested; nor has any other person paid the same.

The second count is similar to the first in its commencement;—here the promise is, that the defendant promised the plaintiff that in case the said John Daly (the tenant) should not pay the plaintiff the said rent, on or before the 1st of January 1841, he, the defendant, should and would pay the same to the plaintiff, upon request: and the plaintiff avers that, relying upon the promise of the defendant, he did then and there, and at the request of the defendant, forthwith withdraw the distress and gave up to Daly (the tenant) the goods and chattels so distrained, and abandoned his right to continue said distress, and to sell the goods for the payment of the rent—of all which the defendant had notice—and Daly did not pay the rent on or before the 1st of January 1841, or at any time; and said period has long

since passed—of which the defendant had notice; and yet he had not paid the same, although often requested, since the 1st of January 1841.

It will be observed, that the first count of this declaration treats this as an original, and the second as a collateral, promise.

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To both of those counts the defendant has demurred specially, and assigned several grounds; many of which, however, if not formally abandoned, were not pressed at the argument, and it becomes necessary to notice only the one ground of demurrer, as far as regards the first count, viz. that the several promises and undertakings in the first count mentioned, appear thereby to have been a warranty on the part of the said Richard Collier, as surety for the said John Daly; and it does not appear thereby, nor is it averred, that there was any default made in the payment of the rent therein mentioned by or on the part of the said John Daly, the person primarily liable thereto. On a careful examination of the several cases which have been cited in the argument, it will be found, that wherever a promise by a defendant, on the giving up of a distress, or the forbearing to sue a third person, has been held binding as an original promise, the consideration has moved to the party who has made the promise. The goods have been delivered up to him, and, not as in this case, where it is expressly averred that they were given up to a third person (the tenant) other and different from the person who makes the promise. I am of opinion that the promise here must be taken to be a collateral, not an original one; and that the demurrer must, from the cause above stated and assigned, be disallowed. And it has been considered, that with respect to the second count, it is on a collateral promise—an undertaking that in case John Daly (the tenant) should not pay the plaintiff the said rent on the day mentioned, he the defendant (Richard Collier) should and would pay the same upon request; and yet it does not appear, nor is it averred, that Richard Collier was ever requested to pay the same, by the plaintiff or any person qualified to make the request. We are of opinion that it was necessary to aver the making a special request, and that the general averment of *licet saxe requisitus* is not in this case sufficient.

TORRENS, J.

I wish to give my reasons for concurring in the opinion of my Lord Chief Justice, the case having stood for judgment for some time—not because it was of any importance in itself, but as involving a principle which the Court was anxious to investigate before they came to a decision on this subject. An action is brought in nature of one on a guarantee, in which the defendant undertakes to discharge the rent due by a tenant, on a delivery of certain goods and chattels which had been distrained, and were in possession of the landlord; not to the party undertaking to pay the rent, but to the tenant himself. There is no case

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which I have been able to discover in which a re-delivery of that kind to the tenant, has been held to be a good consideration to the party making the promise. It will be found in all the cases, beginning with *Williams v. Leaper*, *Castling v. Aubert*, and *Edwards v. Kelly*, that the consideration for the promise flowed to the person promising, by the delivery of the distrained articles to him, which he might deal with afterwards as he pleased. The same principle will be found in *Houlditch v. Milne (d)*; and in the later case of *Tomlinson v. Gell*, to which I more particularly refer, as containing the judgment of Mr. Justice Patteson, whose opinion has been referred to as a commentator, on the principle of the foregoing cases, in that learned Judge's edition of *Saunders's Reports*. Now, in this latter case, the defendant pleaded that the promise was a collateral undertaking to pay the debt of another, to which plea the plaintiff demurred, bringing under the consideration of the Court the direct question, whether the undertaking was original or collateral. In that case, Mr. Justice Patteson says:—"It is alleged, however, that a new consideration arose from the discontinuance of the suit. I do not think it is a new one. The cases on that point have been where something was given up by the plaintiff, and acquired by the party making the promise, as the security of goods for a debt. *Goodman v. Chase (a)*, was decided expressly on the ground, that by the discharge of the original debtor out of custody the debt was gone, and, consequently, the promise could not be to pay the debt of another." This is the principle on which my judgment in this case rests; and it is sustained as well by moral as by legal justice. The landlord abandons the distress, and gets as a security the original undertaking of a third party, to whom the goods are delivered—that this party is not aggrieved, because he may arrange with the tenant the terms on which he will re-deliver to him the goods distrained; and the tenant, under this arrangement, is only liable to him for that debt which was originally due to the landlord, but which, by the interference of the third party, he is not called upon to discharge under the pressure and consequent inconveniences of a distress. I have, therefore, come to the conclusion, that there is no consideration stated in the first count, to support that count as an original undertaking on the part of the defendant. I am of opinion, also, that the second count is bad on special demurrer, as not averring a special request.

BALL, J.

The only difficulty I have had in the case is as to the first count, not by reason of any perplexity in the law on the subject, but from passages which are to be found in the judgments in one of the cases which has been relied on in the argument, and which appear to militate against

(a) 1 Barn. & Ald. 297

what is apparently the true construction of the law. *Prima facie* the promise is a collateral promise ; but authorities have been cited to shew, that though *prima facie* it is a collateral promise, such promises have, under somewhat similar circumstances, been held to be original promises. These authorities are *Williams v. Leaper*, *Castling v. Aubert*, *Houlditch v. Milne*, and *Edwards v. Kelly*. As to the first of these cases, the landlord, who was the plaintiff, does not appear to have actually distrained ; but the goods were left in the possession of the defendant, and out of the goods, as it was understood, the plaintiff was to be paid the amount of his rent. In *Castling v. Aubert*, the plaintiff gave up certain securities on which he had a lien, to the defendant, who thereupon undertook to indemnify him ; and the obvious intention of the transaction was, that those securities should be treated as a fund out of which the debt claimed by the plaintiff was to be paid. The dealing between the parties in *Houlditch v. Milne* was substantially of the same character, viz. that the plaintiff had a lien on the goods delivered up to defendants. In *Edwards v. Kelly* the facts were so far different from *Williams v. Leaper*, that the goods had been actually distrained, and in the possession of the plaintiff, who gave them up to the defendant, on the undertaking that they were to be sold, and that his rent was to be paid out of the proceeds. So that in every one of these cases the goods were delivered up to the defendant, and for the express purpose of enabling him to fulfil his undertaking. These are the circumstances which, in my mind, make the promise an original promise. Now, it has been urged in the case before the Court, that the principle was the same where the party who made the distress allowed the tenant, on the undertaking of a third person, to keep the goods ; but the answer to that statement is simply, that in every one of the cases on which they rely, the defendant got the consideration into his possession, by the very circumstances of the transaction, and not a third party. In fact, the principle on which the whole question depends would have been plain enough, were it not for some passages which are reported in some of the judgments in the later case of *Edwards v. Kelly*, and which have been relied on by the Counsel for the plaintiff, as establishing a different principle from what I conceive to be the correct and true principle of all this class of cases. The principle adverted to is to be found in the judgment of Bayley, J., who states—" I think that the case of *Williams v. Leaper* goes the whole length of deciding this case ; and that in one particular it is stronger than this case, because in that a distress had not been made ; here the plaintiff had the distress in his own hands. After the plaintiff had distrained, he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted ; for so long as the landlord held the goods under distress, the debt due from the tenant was suspended. I think the present case is neither within the letter nor mischief

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"of the act of Parliament, which was aimed at cases where a debt being due from one person, another engaged to pay it for him. But here, for the reasons above stated, at the time when the promise was made, the debt was not owing from the tenant." The point here suggested by Bayley, J., is, that the landlord having distrained, and the distress being in his hands, and the remedy against the tenant thereby suspended, the promise was original, inasmuch as no debt was due at the time. On this principle, Holroyd, J., enlarges as follows:—"If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer—which shews that the debt was for the time suspended. The consideration for this promise was a fresh consideration, not merely moving to the tenant, but to those who made the promise to pay a debt which, at that time, did not exist as the debt of another." On these two passages, it has been argued, that inasmuch as in the case of *Edwards v. Kelly* the promise was original and not collateral, the debt not being in existence at the time of the undertaking; therefore, the ground of the judgment is applicable to this case, where the landlord holding the distress, his remedy being suspended, the debt is also suspended, or not existing, at the time of the promise—which is, consequently not collateral. This reasoning, I confess, suggested a difficulty to me; and I, therefore, looked carefully into those passages, and am clearly of opinion that they do not amount to a statement of such being the principle on which *Edwards v. Kelly* was decided. In none of the previous cases of *Williams v. Leaper* (in which no distress had been made, and in which, therefore, there could have been no suspension of the debt), or of *Castling v. Aubert*, or *Houlditch v. Milne*, was the ingredient of the suspension of the debt to be found; and we must, therefore, look in them for a different principle on which they were decided—and that could have been nothing else than the handing over of the goods to the defendant himself. Now, coming back to *Edwards v. Kelly*, we may in the first place remark, that the report is not very satisfactory—the case having been decided in 1817, and not published until 1829, after an interval of twelve years; and a slight alteration in the words of the Judge, which was not improbable, may have altered the sense considerably. But, independent of that, Lord Ellenborough founds his judgment in *Williams v. Leaper*, stating, that "the case might be distinguishable from *Williams v. Leaper*, if the goods distrained had not been delivered up to the defendant. Here was a delivery to the defendants in trust, in effect, to receive by sale of the goods sufficient to satisfy the plaintiff's demand. The goods were put into their hands subject to this trust." Bayley, J., follows, and does not put his judgment on the circumstances adverted to by Lord Ellenborough, but begins by saying, that *Williams v. Leaper* rules the case; and, after this, he proceeds to superadd another ground, as sustaining the judgment of the Court.

He seems, in fact, to think that he has discovered another principle in the temporary suspension of the debt, and states it is an additional circumstance; but does not say that if such a principle was inapplicable to the facts of the case, he would have differed from Lord Ellenborough. Abbott, J., grounds his judgment solely and entirely on *Williams v. Leaper*; and Holroyd, J., commences by stating that he was of the same opinion, viz., that *Williams v. Leaper* rules the case; but then proceeds, as I have stated above, to follow out the principle mentioned by Bayley, J., mentioning it as a corroboration of the judgment of the Court, not as the principle on which it was founded. This is the only circumstance on which the plaintiff has to rely, as establishing the rule of law to be as he has laid it down; and it is altogether insufficient, as we have seen. Lord Eldon, in *Houlditch v. Milne*, puts the true principle of these cases in terms—"If a person got goods *"into his possession*, on which the landlord had a right to distrain for rent, and he promised to pay the rent, although it was clearly the debt of another, yet a note in writing was not necessary." Nothing can be more precise than this; and, therefore, on the best consideration which I have been able to give the subject, and admitting that there was something in the observations of Bayley, J., which suggested a difficulty, I agree with my Brethren, that the principle of the four cases of *Williams v. Leaper*, *Castling v. Aubert*, *Houlditch v. Milne*, and *Edwards v. Kelly*, is, that the defendant sought to be made liable had the goods on which the plaintiff had a lien in his possession; but that here, the goods being delivered into the hands of the tenant, who is a third party, the promise is not original, but collateral; and, therefore, the absence of any allegation of a default of the principal debtor in the first count, and the want of an averment of a special request in the second, are fatal objections; and, consequently, the demurrer must be allowed, and judgment entered up for the defendant.

Allow the demurrer, and let judgment be entered up for the defendant.

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* Mr. Justice Foster, who took his seat as third Judge in this Court on the first day of this Term, not having been present at the argument, did not deliver any judgment in this case.

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Jan. 12.

BOILEAU v. HOMAN.

A defendant pleaded by mistake "*non assumpsit*" instead of *nil debet*, in an action of debt; and the plaintiff having marked judgment as for want of a plea, refused, on notice and consent, to set it aside without costs. The Court set aside the judgment, with costs, against the plaintiff.

An affidavit of merits made, in compliance with a notice of the opposite party, though not sworn or filed until after the day on which the motion might have been made according to the original notice, may be used on the motion.

MR. NAPIER moved to set aside the judgment of the plaintiff, with costs, on account of irregularity, the same having been marked without rule or notice, and contrary to the course and practice of the Court; and to amend the pleas by substituting the plea of *nil debet* for *non assumpsit*. The declaration, which was for goods sold and delivered, was in debt, and to this Counsel for the defendant had, through inadvertence, pleaded *non assumpsit*. The plea was filed on the 22nd of November; judgment was marked by the plaintiff as for want of a plea, without any notice to amend, of which the defendant was apprised for the first time on the 2nd of December, when he caused a copy of a consent and notice to be served to set aside the judgment without costs. To this consent and notice no answer having been returned, the Attorney for the defendant made an affidavit of the foregoing facts, and that he had filed the foregoing plea, believing it to be a proper plea on which to defend the action on its merits. A notice had been subsequently served on the defendant, requiring him to make an affidavit of merits, and that he had a just and lawful defence to the plaintiff's demand; and, in compliance with this notice, the defendant had sworn, on the 14th of December, "that the goods in the plaintiff's declaration and bill of particulars, or any part thereof, were not sold or delivered by the plaintiff to the defendant, or to any person for his use or on his behalf."

In the first place, this judgment is irregular; *Bayley v. Edwards* (a). Moreover, it is not the practice in this country to allow the plaintiff to mark judgment, in such a case, for want of a plea. The party must come in, and apply to have the plea set aside, and for liberty to mark judgment. This is the rule laid down in *Ferguson's Practice*, collected from cases decided in this as well as in the other Courts; *Colman v. Grady* (b); *Cummins v. Davis* (c); *Anon* (d); *Rice v. Field* (e).

Mr. W. G. Kelly.—There was no irregularity on our part, according to what is the practice in England; *King v. Myers* (f); and according to what, we were informed by the Officer, was the practice of this Court. Besides, the affidavit on which this motion was grounded, was sworn by the Attorney, so that there was no affidavit of merits by the defendant

(a) Cas. temp. Hard. 129.

(c) 1 J. & S. 54.

(e) 3 Law Rec. N. S. 33.

(b) 1 Smythe, 155.

(d) 6 Law Rec. N. S. 121, 122.

(f) 5 Dow. P. C. 686.

himself, at the time that, according to the notice, the motion ought to have been moved in Chamber; *Daniel v. Dalton* (a); *Roe v. Gouldsbury* (b). H. T. 1842.
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DOHERTY, C. J.

The published authorities, which are better than the authority of the Officer, state the practice of the Court to be the contrary of that on which the Counsel for the plaintiff relies. And not only is it the practice, but it is a much better practice than that which prevails in the English Courts on the same subject, as being more conducive to the ends of justice. Had the plaintiff's Attorney apprised the opposite party of his error by notice, he would have had an opportunity of amending without injury to the plaintiff; and having pursued a contrary course, it is obvious that his object was to involve him in needless costs. As to the defendant's affidavit, it was made at the desire of the plaintiff himself, and he cannot now deprive him of the benefit of it. Our rule, therefore, must be,

That the defendant's motion be granted with costs.

(a) H. & J. 346.

(b) 2 Law Rec. N. S. 176.

MURRAY v. GRAY.

Jan. 13.

MR. FITZGIBBON, on behalf of the defendant, applied to have a trial, of which due notice had been given for the next day, being a *Nisi Prius* day, postponed until the Sittings after Term. He also applied for a special Jury. The action was brought on a contract for building, and the defence was that the work had not been done according to agreement; and the trial would, in Counsel's opinion, occupy more than one day.

A trial of a building case postponed until the Sittings after Term, and a Special Jury granted, on the application of the defendant—though the motion was only made on the day before the trial, when the witnesses had been summoned, and the jury panel struck, and though a notice to produce documents at the trial had been served on the plaintiff by the defendant.

Mr. *Whiteside* and Mr. *Darley*, *contra*.—The trial cannot, in our opinion, occupy an entire day, inasmuch as the work was certified by an architect, and accepted by the defendant. Notice of trial had been served eight days ago—our witnesses are all summoned—and so far from any objection or application having been contemplated by the defendant, he served us with notice to produce certain documents at the trial. It was not until he had seen the panel of the Jury which had been struck, that he thought of postponing the trial.

DOHERTY, C. J.

Without any allegation on either side respecting the length of the

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trial, I should most probably, from my own experience of building cases, have put the one in question at the foot of the list, when I came to know the nature of it. As for the notice served by the defendant for the production of documents at the trial, it proves nothing as to his intention of applying for a postponement, as he could not anticipate what the order of the Court might be; and the application for a Special Jury might have most properly been made, when he had ascertained that the Jury struck was not of sufficient intelligence to try the case. I shall, therefore, grant the defendant's motion on the terms of his paying the costs.

Let the motion be granted on the terms of paying the costs.

BRENNAN v. FRENCH.

Jan. 12.

The Court refused to allow a judgment to be satisfied, on payment to the plaintiff's Attorney of a sum compromised between him and the defendant, the plaintiff residing in New South Wales—although the Attorney held a general power of attorney, to sue for and give discharges for all debts due to the plaintiff, and had been empowered by letter to issue execution on the said judgment.

MR. KANE applied for an order of the Court, that on the payment of £450 to the plaintiff's Attorney by the defendant, the Officer might be at liberty to enter satisfaction on the judgment, which was for £600.

The conusee lived in New South Wales, and the Attorney held a power of attorney from him "to ask, demand, and sue for, all debts then due "or to grow due to the plaintiff, and on payment, to give receipts and "discharges for the same;" and he had been empowered by letter to issue, and had issued, execution on this identical judgment. There were, moreover, letters dated in 1835 from the plaintiff to the Attorney, to the effect, that if he could get a purchaser for the said judgment he would take £400 for it. The defendant had consented to give £450, and was ready to pay over that sum to the Attorney, on the judgment being satisfied; *Bastos v. Wilmot (a)*.

DOHERTY, C. J.

It is a delicate proceeding for the Court, where a power of Attorney is general, as in this instance, to extend it to an authority to receive payment of a judgment, when it is not certain that it was the intention of the party that the Attorney's hand was that which was to receive the money; and, therefore, without any imputation on him, we think it the duty of the Court to require the plaintiff, to execute a specific power to receive the money and satisfy the judgment.

No rule.

(a) Hod. 15.

H. T. 1842.
Common Pleas.

GRAYDON in replevin v. KERNAN.

Jan. 14.

MR. PLUNKET, with whom was Mr. Kernan, moved that the plea of *riens in arrear* filed by the plaintiff in this cause, be set aside with costs—such plea not having been framed conformably to a consent entered into, in consideration of getting further time, to plead issuably, and take short notice of trial. The action was replevin for goods distrained for rent and rent-charge, to which the defendant put in two separate avowries for rent and rent-charge, and six cognizances in the names of three different parties. The plaintiff pleaded to the cognizances three pleas of *non tenuit* to the several persons from whom cognizances had been made; and also a plea to all the avowries and cognizances of *riens in arrear* “from the said plaintiff to the said defendant, in manner and form as the said defendant hath in his said avowries and cognizances in that behalf alleged.” The plaintiff had offered by consent to amend by striking out the words “to the defendant;” but Counsel contended that the amendment offered was equally objectionable, and that the plaintiff should amend by pleading, as in the case of *non tenuit*, *riens in arrear* to each of the persons in whose names cognizance had been made. Issue could not be safely taken otherwise.

The plaintiff in replevin being under terms to plead issuably, pleaded to all the avowries and cognizances in the names of several parties, a plea of *riens in arrear* “from the plaintiff to the said defendant.”—The Court ordered the plea to be taken off the file, with costs; but gave the plaintiff liberty to plead anew.

Mr. Napier, *contra*, contended that the defendants had no right to come in to set aside the plea. They might have taken issue and have gone to trial on it.

DOHERTY, C. J.

The motion is not to set aside the plea generally, but to set it aside, because it is not conformable to consent. Let the plea, therefore, be taken off the file, and let the plaintiff be at liberty to plead anew, paying the costs of this motion.

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Common Pleas.

POWER v. HARRISON.

Jan. 17.

In an action for maliciously and without probable cause, issuing a search warrant to search the plaintiff's house, for goods alleged to have been stolen from the defendant; the Judge charged the Jury that, in his opinion, there would be sufficient to constitute probable cause, if they believed the facts given in evidence, and left it to them on the whole of the case to find whether there had been probable cause or not; and also directed them to find for the plaintiff, if they believed that there was any malice on the part of the defendant.—*Held*, that the direction was right, and that the Jury having found for the defendant, the Court could not interfere in granting a new trial.

THIS was an action brought by the plaintiff against the defendant—for that contriving and maliciously intending to injure the plaintiff, &c., he falsely and maliciously, and without any reasonable cause whatsoever, procured one P. H. to swear before a certain Justice of the Peace, that the residence of the defendant was feloniously broken open, and a great variety of valuable articles stolen thereout, the property of the defendant; and that the said P. H. had reason to believe that the said property was concealed in the lodgings of William Egan of Dorset-street, or of Robert Power (the plaintiff) of South Cumberland-street, both in the city of Dublin; and upon such charge he, the defendant, then and there falsely, maliciously, and without any reasonable or probable cause whatsoever, procured the said Justice to make and grant his certain warrant, authorising and empowering the police, &c., to make diligent search for the above property so feloniously stolen in the residence of the said W. Egan, Dorset-street, and of Robert Power (the plaintiff) of South Cumberland-street, and to take such property into their possession, together with any person on whom the same might be found, &c.; and that the said defendant afterwards falsely, maliciously, and without any probable cause whatever, did, under the pretext of executing the said warrant, together with a certain police constable, enter the dwelling-house of the plaintiff, and ransack his presses, &c., to the great disquiet and disturbance of the plaintiff and his family in the possession of the said dwelling-house.

The action was tried before the Chief Justice at the Sittings after the last Term. The informations and search-warrant were proved; and it further appeared in evidence, that the house of Egan had been searched and papers of the defendant found there; and that afterwards the house of the plaintiff had been slightly searched by the defendant and a police constable, but nothing belonging to the defendant having been discovered, on the plaintiff giving his word of honour that he had nothing belonging to the defendant, the latter took his departure, after some apparently friendly conversation with the plaintiff respecting some fees due to him. After his departure, the police constable, who stated that his suspicions that the parties had been compounding a felony, had been created by the circumstances of the foregoing conversation respecting fees, took the plaintiff into custody on his own responsibility, and brought him to the police office, where he was discharged by the Magistrate. It was also proved, that the party who had broken open the house, and sold or carried off the defendant's goods and chattels, was the assignee of the

defendant's property appointed by the Insolvent Court, with the full knowledge and privity of the defendant.

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Common Pleas.
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The Judge had charged the Jury, stating, that, in his opinion, there would be sufficient to constitute probable cause for the defendant to have the search warrant issued, if they believed the facts given in evidence—and he left it to them, on the whole of the case, to find whether there had been probable cause or not. The remainder, which was the principal part of the charge, was as to whether the defendant had been actuated by malicious motives in the proceedings he had taken, and the Jury were directed to find for the plaintiff if they were of opinion that there was any malice on the part of the defendant. The Jury found for the defendant. It appeared that some objection had been made at the trial to the Judge's charge, and that he had justified it on the authority of *McDonald v. Rook (a)*.

Mr. *Hatchell*, Q. C., and Mr. *Murphy*, Q. C., moved to have the verdict set aside, and a new trial directed, on the ground of the learned Judge having misdirected the Jury, both in point of law, and in point of fact. In the first place, the Judge should not have left the question of probable cause to the Jury. It is for the Judge to tell the Jury that if they find the facts proved, and the inference warranted thereby, that they do or do not amount to probable cause—so as to leave the question of fact to the Jury, and the abstract question of law for the Judge. This is finally settled to be the law by the recent case of *Panton v. Williams (b)*. Secondly, the Judge ought to have stated that no probable cause had been proved, and to have directed the Jury accordingly to find for the plaintiff; and the only question for them to decide was that of damages; for, in the first place, no felony had been committed, inasmuch as the property had been seized under the authority of the law; and, in the next place, the plaintiff was admittedly aware of that circumstance, and there would, therefore, have been no probable cause.

DOHERTY, C. J.—How can you get over the fact of the Jury having by their verdict negatived malice?

Mr. *Murphy*, Q. C.—If there was, as we contend, no probable cause, malice would be necessarily inferred: *Elsee v. Smith (c)*; *Burley v. Bethune (d)*.

DOHERTY, C. J.

There is a class of cases in which malice would be necessarily inferred

(a) 2 Bing. N. C. 217.

(b) 19 Law Journal, 545.

(c) 1 D. & R. 97.

(d) 1 Marsh, 220.

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from the absence of probable cause ; but this is not one of that class ; for the act complained of is not of a nature that *per se* imports malice. The case here is—the defendant alleges that A. B. took goods feloniously, and that they are concealed in the house of C. D. which does not involve a charge of felony against C. D. The judgment of Mr. Justice Patteson in the case of *Mitchell v. Jenkins* (a) illustrates the position, that there are certain cases (and this is one of them), where, from the absence of probable cause, it is not necessarily to be inferred that the act complained of was malicious. He says—"If the Jury are to be told, "that where a want of probable cause is proved, malice must necessarily "be inferred, in future it will be only necessary to prove in every case "want of probable cause—whereas it is essential for a plaintiff to prove "facts from which a Judge may decide that there is a want of probable "cause, and the Jury malice." With respect to misdirection, I am so far from considering my charge to the Jury any misdirection, that if the case were to occur again, after full consideration, I should direct the Jury in the same way ; for I do not think that the case of *Panton v. Williams*, which has been cited as overruling all the previous cases, including that of *McDonald v. Rooke* (by which I was very much guided in my charge), goes to that extent. On the contrary, *McDonald v. Rooke* is in some degree confirmed by the circumstances of that case ; for, although it was cited in the argument, Chief Justice Tindal, by whom it had been previously decided, and who delivered the judgment in *Panton v. Williams*, does not in any way advert to it as conflicting with that case. Consequently, I conceive it to be good law still. In truth, the question of probable cause formed a very small portion of my charge, the greater part of it having been directed to the question of malice ; but, having stated to the Jury what I considered to constitute probable cause, I submitted the facts to them, and I entirely concur in their finding ; and, therefore, am of opinion that the verdict must be allowed to stand.

FOSTER, J.

In this case, the Jury found that the defendant had not been actuated by malicious motives in his conduct towards the plaintiff, and they came to that conclusion after the Chief Justice had explained to them what it was that constituted probable cause, and left it to them to say whether on the facts there was probable cause or not ; and the Jury having found that there was no malice, or a probable cause for the proceeding of the defendant, and the Chief Justice agreeing in, and approving of, both conclusions, I cannot see why we should direct a new trial, merely to allow them to come to the same conclusions again. Every application for a new trial, I conceive to be, in some measure, to the discretion of

(a) 5 B. & Ad. 588.

the Court; and no good could arise from exercising that discretion in ordering a new trial in this instance, except to involve the parties in further expense. I am satisfied that justice has been done, and have, therefore, no hesitation in concurring in the judgment of my Lord Chief Justice.

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BALL, J., concurred in the judgment and reasons of the Court.

DOHERTY, C. J.—To obviate any wrong inference that might be drawn from the judgment of my Brother Foster, I would merely add, that, even on the supposition that I was of opinion that there was no probable cause, it would be still most important to consider whether the act was malicious or not.

No rule on the motion.

STANHOPE and others v. MATHEWS.

Jan. 18.

THIS was an action brought by the plaintiffs, who were the Directors of the National Bank of Ireland, against the defendant, as a surety of a defaulting accountant of the said Bank. To the declaration in debt on bond the defendant pleaded *non est factum*, and claimed oyer of the condition, which was to the following effect, after a recital of the establishment of the Banking Society:—"Whereas the above bounden "R. F. Q. hath been appointed by the Court of Directors of the said "Society, to be accountant in the said bank established at Longford, "in connection with the said Society; and it hath been agreed that the

Bond, conditioned (after a recital that R. F. Q. had been appointed by the plaintiffs as Directors of the National Bank, to be accountant in their bank, established at L., and that the defendant had with other persons agreed to

enter into the obligation as his sureties) that if the said R. F. Q. should from time to time, and at all times, faithfully account for, pay, and deliver up to the Court of Directors for the time being of the said Society, or to such other person or persons as such Court of Directors should from time to time appoint or depute for that purpose, and in such place of Great Britain or Ireland as the said Court should direct, all and every such sums of money as he the said R. F. Q. had been, or at any time thereafter should, while he continued in the service of the said Society exclusively, or be employed for or on account of any local bank, either as accountant, or in any other capacity whatever, either at the bank at L., or at any other established, or to be established, be entrusted with, or had already received, or should at any time thereafter receive, for or on account of the said Society, or of any local bank in connection with them, &c. The defendant pleaded performance.—*Held*, that it was not necessary for the plaintiffs to aver in the breach in their replication that the Directors had appointed a person by whom, or a place in which, the accounts were to be taken.—*Held also*, on special demurrer, that the plaintiffs having averred that R. F. Q. was employed by the said Society as accountant in the branch bank at M., and that he continued in the service of the said Society exclusively as such accountant from, &c., it was not necessary to aver an appointment of the said R. F. Q. to the office of accountant at M., or that he had accepted of the said office.

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"said R. F. Q., and the above bounden Benjamin Mathews (the defendant), as his surety, should enter into the above written obligation with such condition for avoiding the same, as in the condition hereunder written is expressed. Now, the condition of the above written obligation is such, that if the above bounden R. F. Q. shall, from time to time, and at all times, faithfully and truly account for, pay, and deliver up to the Court of Directors for the time being of the said Society, or to such other person or persons as the said Court of Directors shall from time to time appoint or depute for that purpose, and at such place in Great Britain or Ireland as the said Court shall direct, all and every such sum or sums of money, notes, securities, &c., as he the said R. F. Q. hath been, or at any time hereafter shall, whilst he shall continue in the service of the said Society exclusively, or be employed for or on account of any local bank, either as accountant, or in any other capacity whatever, either at the bank of which he hath been appointed accountant as aforesaid, or at any branch or local bank already established, or hereafter to be established, or at the house or office of the said Society in London, be entrusted with, or hath already received or obtained, or shall at any time hereafter receive or obtain for any person or persons, or in any manner for or on account of, or for the use of the said Society exclusively, or of any local bank in connection with the said Society," &c. Such being the terms of the condition, the defendant pleaded for a further plea—"Actio non, because that the said R. F. Q. did at all times faithfully and truly account for and pay and deliver up to the Court of Directors of the said Society, or such persons as they appointed for that purpose, at such place or places as they directed, all and every sum or sums of money, notes, securities, &c., as he the said R. F. Q., whilst he continued in the service of the said Society exclusively, or was employed for or on account of any local bank, then or since established, either as accountant, or in any other capacity whatsoever, or at any branch or local bank, or at the house of the said Society in London, hath received or obtained from any person or persons, or in any manner, for or on account of, or for the use of the said Society exclusively, or any local bank in connection with the said society, &c. : and this defendant further saith, that the said R. F. Q. did from time to time, and at all times after the making of the said writing obligatory, well and truly observe, perform, and keep, all and singular, other the articles, clauses, conditions, and agreements in the said condition specified, &c., according to the tenor and effect, true intent, and meaning of the said writing obligatory, and this he is ready to verify, &c." To this the plaintiff replied, taking issue on the first plea, and to the second *precludi non*—"Because, that after the making of the said writing obligatory, at Moate, he, the said R. F. Q., was employed by the said Society, &c., as accountant in a branch bank of said Society at Moate,

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"and that he continued in the service of the said Society exclusively as
"such accountant, from the 1st of July 1836 until the 1st of April 1838;
"and that while he continued such accountant, he, the said R. F. Q., as
"such accountant, to wit, on, &c., had and received for and on account
"of the said Society, divers sums of money, amounting to, &c.; yet the
"said R. F. Q., although often requested so to do, hath not as yet ac-
"counted for or paid the same, or any part thereof, to the Court of
"Directors, or to any other person or persons on behalf of the said
"Society or co-partnership, but hath therein wholly failed, and made
"default; and the said sum of money so had and received by the said
"R. F. Q. is still wholly due and unpaid to the said Society, contrary to
"the true intent and meaning of said condition, &c.; of all which the
"said defendant had notice, &c.; and this the said plaintiffs are ready to
"verify," &c. There was a second breach, alleging a default in similar
"terms, of the said R. F. Q. as *accountant or teller*,—a third as *manager*,
—and a fourth as *manager or teller*. To this replication the defendant
demurred generally, and also for special causes, which will appear in the
course of the argument, and the plaintiffs joined in demurrer.

Mr. Richard O'Connell and Mr. Macdonagh, in support of the de-
murrer.—The breach ought to negative the performance of that which
the principal ought to have done under the covenant or condition; and,
therefore, every previous act that was necessary on the part of the plain-
tiffs ought to be averred. Consequently, in this case, the Directors
should have averred that they had appointed some specific place in
Great Britain or Ireland, and that some particular person or per-
sons had been deputed by them to take the said accounts. The
replication contains no such averment, and is, on that account, bad. The
alleged defaulter was not to appoint the place and person, but the Court
of Directors; and the appointment could not have been within the
knowledge of the defendant—the action having been brought against him
as one of the sureties. This, therefore, does not come within the class
of cases in which it is unnecessary to plead any thing within the know-
ledge of the defendant. Moreover, claims against a surety must be
taken *strictissimi juris*, as he is always favoured in law; *Goss v. Wat-
tington* (a). The principle is, that the defendant must have sufficient
knowledge to enable him to prepare for his defence; and he should,
therefore, be put in possession of the place in which, and the person
before whom, the principal was to account; for, *non constat* but the
parties appointed might have been most improper and objectionable
persons, and the place might have been most inconvenient. Every
fact within the knowledge of the plaintiff, and not within that of the

(a) 6 B. Moore, 366.

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defendant, must be distinctly averred, as if the condition of the bond were to account for all monies received by a certain Officer, the breach alleging a refusal to account, must also aver that the office had been accepted, and that monies had been received; *Serra v. Wright* (a); *Serra v. Fyffe* (b). The cases of *Hayman v. Gerrard* (c), and *Stothard v. Goodfellow* (d), are confirmatory of the same proposition. These authorities also support our second cause of demurrer, viz., that the principal was removed from the situation of clerk at Longford (in which situation the bond recites him to have been), to Moate; and it is not averred that he was appointed to such latter situation by the Court of Directors, or that he had accepted of the appointment; *Parker v. Barker* (e); *Dunne v. Girdler* (f); *Stibbs v. Cluffe* (g); *Strange v. Lear* (h). It is doubtful if, under the circumstances of the change of situation, the bond is not defunct. It is also necessary, in assigning breaches, as in the case of *Serra v. Wright*, to aver the acceptance of the appointment by the principal; because, although he accepted of one situation at Longford, as recited in the bond, it does not follow that he accepted of the other at Moate, in which he is alleged to have been a defaulter; and to say that he was employed as accountant at Moate, is a negative pregnant, and mere matter of inference.—[*Per Curiam*. It is stated that he continued in the service of the society as accountant at Moate.]—Continuance in employment is not the same as acceptance of situation—at all events on special demurrer, it should have been averred, that he had been appointed and had accepted, as appears from the note to the precedent from which this declaration was taken, in *Chit. on Plead.* 1178 (5th ed.), where it is laid down, that “unless it appears from the condition of the “bond, that E. F. has already accepted the office, an acceptance thereof “should be stated.” Another cause of demurrer is, that it is uncertain in what capacity or situation the principal was employed at Moate: as in one of the breaches he is stated to be an accountant or teller, and in another, a manager or teller. The Court, in overruling this demurrer, must go to the extreme, that the Directors might have employed the principal in any number of different capacities, and in every branch of their bank in Ireland; and after having been changed from situation to situation, at the end of any number of years, that it was competent for them to go back to the first situation in which he was employed, and charge him with an account of sums received there. This was what the Court refused to allow in *Lord Arlington v. Merricke* (i).—[DOHERTY, C. J.]

(a) 6 Taunt. 45.

(c) 1 Saund. 101.

(e) 1 T. R. 295.

(g) 1 Str. 227.

(b) 1 Marsh. 441.

(d) 1 N. & M. 202.

(f) 1 N. Rep. 34.

(h) 3 East, 284.

(i) 2 Saund. 470.

There is no limitation of time of employment in this, as in *Lord Arlington's case*; and, therefore, it does not fall within the principle of it.]—*Id certum est quod certum reddi potest*. The plaintiffs ought to have averred the duration of the employment. The breach ought to be as particular as the condition; *Farrar v. Chevalier* (a).

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Mr. *Patrick Cogan* and Mr. *Monahan*, *contra*.—The replication in this case has followed the precedent in *Chitty on Pleading*, 1178 (5th ed.), almost verbatim, varying only where the condition of the bond rendered some variance necessary. As to the objection, that no person or place was appointed to have the account taken; the true construction of the condition in that respect is, that the principal should account at all times whensoever and wheresoever called upon; but that if the Directors should, for their own convenience, appoint any particular place, or any particular person to take the account, he was bound to attend there, and give the account required. The appointment of time, place, and person is not, as contended, a condition precedent, it being optional with the Directors to appoint in those particulars, if they thought proper so to do. If the party to account had absconded or died, according to the construction of the opposite side, there could have been no remedy against the sureties. It is an established rule of pleading, that a party, in an action like the present, may either plead performance, or else in excuse of performance. The former has been here pleaded; and after such a plea, it is not competent for the defendant to demur specially, that there was no appointment of time, or place, or acceptance of office averred. It might have been a good cause of demurrer if the plea had been pleaded differently. *Gibbs v. Southam* (b). This brings us to the second objection made as to the absence of an averment of appointment or acceptance of office. In *Serra v. Wright* and *Serra v. Fyffe*, which appear to have been the same case, a general plea of performance was pleaded, and there was no allegation that money had been received, or that the office had been accepted, which was held to be fatal. But our allegation is not that the principal was appointed to a voluntary office, but merely that we had employed him, and that he continued in our employment or service. This is equivalent to an averment of acceptance of office, if such an averment had been necessary, which it was not, as the condition recites his employment by us, and only provides that he shall account for all sums of money to be received during the continuation of his employment, no matter in what locality or office. *Serra v. Fyffe*, which is more fully reported than *Serra v. Wright*, is, in fact, an authority in our favour; for it appears that two breaches were alleged in that case: first, that the party had refused to account for monies received by him; and

(a) 1 Salk. 139.

(b) 5 B. & Ad. 511.

H. T. 1842.
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secondly, that he had received money, and did not account. To the latter there was no demurrer for non-averment of acceptance of the office; because the receipt of the money imported the acting in, and acceptance of office. So here the allegation of continuation in employment necessarily imports the appointment to, and acceptance of, office. As to the objection with respect to the uncertainty of the situation to which the principal was appointed, there is nothing in it; as, in the first place, accountant and teller are synonymous: and, in the next place, in some of the breaches, he is stated to have been employed in a single capacity; and if any one of the breaches is good, it is sufficient. The case of *Lord Arlington v. Merricke* does not apply, that case having been decided on the construction of the instrument, which was held not to refer to future appointments, on the sole and simple ground, which is wanting in this case, that the liability was limited to a specific period. This is confirmed by the principle which is deduced from that and the similar class of cases in *Theobald on Principal and Surety*, 66, viz., "If a person is surety for the fidelity of another, in an office of limited discretion, or the appointment to which is only for a limited period, he is not obliged beyond that period."

Per Curiam.

As to the first cause of demurrer, viz., that there was no averment of the appointment of a specific time and place, where, and by whom, the account might be taken, we think that the construction put upon the condition by the plaintiff's Counsel is the correct construction; and that, therefore, it not having been incumbent on the Directors to nominate any place or person, the averment of such was unnecessary. As to the next cause of demurrer, that the appointment or acceptance of the office by the principal was not averred, it is stated, that the party was employed in the service of the Directors, and that imports acting and acceptance. With respect to the alleged uncertainty of the office in which the principal was employed, there were several breaches in the replication, to some of which such an objection does not apply: and if any one of the breaches is good, it is sufficient. We must, therefore,

Overrule the demurrer.

H. T. 1842.
Common Pleas.

CLARKE v. M'DANIEL.

Jan. 14.

MR. MONAHAN, Q. C., with whom was Mr. *Gerahty*, on behalf of the defendant, moved to strike out the first count in the declaration, with costs, and that the plaintiff be restrained from proceeding until he had furnished the defendant with a copy of the assignment of the deed of annuity on which the action was brought. With respect to the former part of the motion, the first count was for four years' arrears of annuity, ending on the 1st of May 1840; and the second count differed from it in the sole particular of declaring for five years' of the same annuity, ending on the 1st of May 1841, so that it appeared that all the relief claimed by the first count could have been obtained under the second; and, therefore, that first count was superfluous, unnecessary, and obviously inserted in the declaration, for the purpose of increasing the costs. As to the latter part of the motion, it appeared that, besides the present action, process in another, at the suit of the plaintiff's son, as assignee of the said annuity deed (which also appeared from an account furnished), had been previously served on the defendant; and Counsel contended that this Court had a summary equitable jurisdiction to order the production of an instrument acknowledged to be in the plaintiff's possession; and this equitable jurisdiction had been extensively acted on in latter times; *Whitton v. Cazalet* (a); *Barry v. Alexander* (b); *Bateman v. Phillips* (c); *Tidd. P.* 639, 641.

A declaration in debt on an annuity deed contained two counts, the first for four years' arrears due May 1st 1840, and the second for five years' arrears of the same due May 1st 1841. The Court would not strike out the first as superfluous, it having been suggested that there had been an assignment of the deed. The Court also refused to compel the plaintiff to furnish the defendant with a copy of the assignment of the annuity deed.

Per Curiam.—The cases cited are cases in which the instruments of which inspection was required were those on which the action was founded; whereas, here you require the Court to give you inspection of an instrument, not on which the action was founded, but which would, if produced, have the effect of defeating the action. It would be giving you the benefit of a bill of discovery.

Mr. *Darley* and Mr. *Keogh*, were desired by the Court to confine themselves to the first point.—There was a necessity, under the circumstances of the case, for two counts in this declaration, inasmuch as if the deed of assignment alluded to was executed subsequent to the 1st of May 1840, as is the fact, and operated as a legal, not as an equitable assignment to the son of the plaintiff, we could not recover on the second count; because in the action of debt, the precise day in which the annuity became due

(a) 2 T. R. 683.

(b) 4 Doug. 15.

(c) 4 Taunt. 161.

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Common Pleas.

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must be stated with precision ; and if mis-stated, the action must fail, and we be defeated, if that were our only count. On the other hand, having another count for the arrears due up to the 1st of May 1840, we could, under that count, recover the four years' annuity due on that day ; and this is the peculiarity of the action of debt instead of covenant. *Gilbert on Debt*, 407.* Only for the assignment, we would admit that the first count was superfluous.

The COURT suggested a reference, which the Counsel for the plaintiff declined, as the defendant would not undertake to admit the validity of the annuity deed ; and the motion was refused, without costs.

Let the motion be refused, and no costs to either party.

* See vide *Buckley v. Kenyon*, 10 East, 141.

FAHIE v. NASH.

Jan. 15.

The defendant, against whom judgment had been marked, and a writ of inquiry sped, having sworn that he had never been served with the process, but admitted the debt, the Court ordered him to pay the amount of the plaintiff's demand to him ; and that the Officer should hand over the process-server's affidavit, in order that he might be prosecuted, reserving the question of setting aside the proceedings, and the question of costs in the mean time.

MR. R. BOWEN moved that the parliamentary appearance and all subsequent proceedings might be set aside, the defendant never having been served with the writ of process, as sworn by the process-server, and that the affidavit of the process-server might be taken off the file, in order that he might be prosecuted at the next Assizes for perjury. Affidavits were made by the defendant, in support of the motion, denying the service, and stating circumstances whereby there was strong ground for believing that the defendant had never been served ; and accounting for a delay of ten days which had taken place between his having been apprised by notice of the speeding a writ of inquiry, and giving notice of this motion, by stating that his Attorney lived at a great distance from him. Defendant was willing, and still offered to pay the amount demanded, but the plaintiff would not accept it without the full costs incurred. Counsel applied for an order similar to that in *Comerford v. Burke* (a).

Mr. Otway, for the plaintiff, contended that the Court would not decide between the conflicting statements of the defendant and the process-server, but ought to leave the former to make out his case against the latter, before they would interfere with the proceedings which had been taken. He objected to the order in *Comerford v. Burke*, as the inconvenience of it was proved by the motion which was made in the

(a) 2 Ir. Law Rep. 197.

same case (a), after the prosecution; but had no objection to receive the sum claimed from the defendant; and that the amount of the costs incurred should be lodged in Court, to abide the order of the Court, after the prosecution.

H. T. 1842.
Common Pleas.

FAHIE
v.
NASH.

Per Curiam.

We are of opinion that the defendant ought to pay the debt which he acknowledges to be due; but the Court will not, at present, pronounce any order respecting the costs, or that they should be lodged in Court, there being no allegation of insolvency of the plaintiff. At the same time, we think it better not to make a prospective order contingent on the event of the prosecution, as in *Comerford v. Burke*,* and we shall, therefore, order,

That the defendant pay over to the plaintiff the sum claimed in the declaration, in ten days from the date; and that the proper Officer do hand over the affidavit of T. D., the process-server, to the Clerk of the Crown for the County of Cork, to enable the defendant to prosecute the said process-server at the next Assizes; and that the remainder of the motion, and the question of costs, do stand over in the mean time.

(a) 2 Ir. Law Rep. 85.

* The order in *Comerford v. Burke*, which was—"That the costs of the motion and of the proceedings do abide the event of the prosecution," would, we conceive, be attended with the additional inconvenience of disqualifying the principal witness, by giving him a direct pecuniary interest in the result of the trial.

Lessee St. GEORGE v. CASUAL EJECTOR.

Jan. 22.

MR. P. BLAKE applied that the service of the ejectment, summons, and notice, had in this case, be deemed good service on the lessee and some of the under-tenants. The ejectment was brought by the receiver under the Court of Chancery for non-payment of rent; and several of the under-tenants having been personally served, the process-server could not obtain entrance into the house of the lessee or the remainder of the under-tenants, and was obliged to put the copies of the ejectment under the doors of the houses; and he swore that he believed the same to have reached the hands of the parties to whom they were directed. It was also stated by Counsel, that a motion had been made, on the day before, in the Rolls Court, on the part of the lessee, to stay the ejectment in

Service of copy of ejectment, &c., for non-payment of rent, on the lessee and under-tenants, by putting the same under their respective doors, which were closed for the purpose of preventing personal service, deemed good service, posting the premises with the

ejectment and order—the lessee having made a motion in the Rolls Court to stay proceedings on the ejectment.

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Common Pleas.

ST. GEORGE

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question, which was refused, and which was evidence of some knowledge of the lessee on the subject.

Per Curiam.

As the motion in the Rolls to stay the ejectment may be, in some measure, relied on as an adoption of the same—let the service of the copies of the ejectment, summons, and notice, had in this case, be deemed good service, posting the premises with copies of the same, and of this order ; the receiver making an affidavit of the circumstances of the motion in the Rolls Court.

WALDRON in replevin v. HUSSEY.

Jan. 17.

A party will not be ordered to pay the costs of a motion to set aside a judgment regularly obtained, even though a consent had been previously tendered, offering the same terms that were ordered by the Court.

MR. COPPINGER, Q. C., having obtained a conditional order, that the judgment marked in this case for want of a declaration, might be set aside, on certain terms contained in a consent tendered before notice of the motion—

Mr. *Whiteside* shewed cause.

The COURT having been of opinion that the judgment should be set aside, and the plaintiff let in to declare on the terms offered by the consent—Mr. Coppinger applied for the costs of the motion, on the ground of having tendered a consent to do what the Court had directed ; *Reynolds v. Kelly (a)*.

Mr. *Whiteside* admitted the tender of the consent ; but contended, that having strictly pursued the rules of the Court, he had a right to keep his judgment, which was regular.

DOHERTY, C. J.

The general rule has been stated correctly by Mr. Coppinger, but this is one of the exceptions : A party cannot be asked to waive a judgment regularly obtained, as a matter of course, more especially, as he had no opportunity of knowing that his adversary had any merits.

Let the conditional order be made absolute on the terms offered in the consent, the plaintiff paying the costs of this motion.

(a) 3 Ir. Law Rep. 186.

H. T. 1842.
Common Pleas.

RODDY, *Petitioner.*
CONROY, *Respondent.*

Jan. 17.

THE petition in this case had been filed, praying that the respondent might be ordered to tax certain costs, and furnish a list of credits on oath within four days, but not alleging any particulars of misconduct on the part of the respondent in refusing a list of credits, nor an undertaking on the part of the petitioner to pay the amount of the said costs when taxed and ascertained.

Mr. *Macdonagh*, on behalf of the respondent, now moved that the said petition be discharged *with costs*, the plaintiff undertaking to have the bill of costs in question, together with four other bills of costs on other transactions as Solicitor for the petitioner, taxed, and to furnish a list of credits within a week.

Mr. *Collins, Q. C.*, objected to such an order, inasmuch as although a retainer was admitted in the cause in which the costs which were the subject-matter of the petition had been incurred, yet that in the other cases it was denied. It was also contended, that the petition was not irregular, as the petitioner had a right to ask for a list of credits under the general jurisdiction of the Court, and the respondent having denied that he had ever received any sums on account of the petitioner, the costs ought to abide the result of the investigation to ascertain the truth of that statement.

DOHERTY, C. J.

The petition is obviously irregular—being, neither a petition against an Officer of the Court for misconduct—inasmuch as it does not state any particulars of misconduct on the part of the respondent, nor any previous demand of a list of credits—nor the common petition of reference to tax costs, inasmuch as there is no undertaking in it to pay the costs when ascertained. Under these circumstances, we shall give the respondent his costs, and make the following order :

That the five several bills of costs be referred to the Officer for taxation, the Officer to assume for the purposes of that taxation the fact of retainers ; and that the said respondent do, within ten days, give all credits upon oath, and that the Officer do ascertain the amount of such credits ; and that a balance be struck with reference to each bill—the petitioner undertaking to pay

A petition praying a taxation of respondent's costs, and that he should furnish a list of credits, without alleging misconduct on the part of the respondent in having refused the credits required, or an undertaking on the part of the petitioner to pay the amount of the costs when ascertained.—*Held*, to be irregular, and that the respondent was entitled to the costs from the petitioner.

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Common Pleas.

RODDY
v.
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such balances if found against him, if he shall not think proper to dispute a retainer in any of the said causes; but if he should dispute them, that the said respondent be at liberty to bring his action, and the petitioner to contest the retainer, and the said respondent shall pay the balance if found against him; and that the petitioner do pay the costs of this motion to the respondent, and not dispute a retainer in the cause mentioned in the petition.

Jan. 25.

DANIEL, in replevin, v. BINGHAM.

In a replevin case, the defendant's Attorney having premised the plaintiff's Counsel additional time to join in demurrer, which was afterwards withdrawn by the orders of the defendant himself, and judgment marked—the plaintiff having pleaded no plea to the merits, the judgment was set aside without any costs by either party.

Under the circumstances, the Court suspended their general order, and allowed the cause to be set down for immediate argument.

MR. WHITESIDE moved that the judgment which had been marked in this case should be set aside with costs, and the costs of the motion. The plaintiff had only pleaded that no particulars of the distress had been furnished pursuant to the provisions of the 6 & 7 W. 4, c. 75. s. 6. To this plea the defendant had demurred; and the plaintiff's Counsel, on the last day for joining in demurrer, had made application to the Attorney for the defendant for additional time, with the view of re-examining his pleas, to which he received the following written reply:—"Sir. I will be too happy to afford every accommodation in my power—I will call on you or meet you in Court to-morrow." The Attorney on the next day met the Counsel in the Courts, and told him that his client would not consent to any delay, and that he should, therefore, be obliged to mark judgment, which he accordingly did at one o'clock: *Dancer v. Kelly (a)*. No injury could have accrued from the delay, as by the rule of this Court the cause could not be set down for argument until next Term.

Mr. Macdonagh, *contra*.—In the first place, the plaintiff is not entitled to have this judgment set aside, as the obvious purport of the Attorney's letter was, that the permission must be contingent on his client's will; and, moreover, the plaintiff can have no merits, having pleaded neither *non tenuit*, nor *riens in arrear*, nor any other defence on the merits. But even if the Court should be of opinion that the judgment should be set aside, we should not, under the circumstances, be saddled with costs; or, at all events, they should be directed, as in the similar case of *Drury v. Johnson (b)*, to abide the event of the suit.

DOHERTY, C. J.

There is something peculiarly embarrassing in the circumstances of this

(a) 3 Ir. Law Rep. 64.

(b) 13 Price, 489.

case. But one thing is quite clear, that the judgment cannot be allowed to stand. The only question is, as to costs and terms. There is no imputation on the Attorney, who seems to have been willing to concede the indulgence asked for; but the client having been annoyed at the delay, which was perhaps unintelligible to him, interposed, and took it out of the hands of his agent. This intervention of a third person creates the embarrassment. There can be no doubt, but that the note written contained an unequivocal promise on the part of the Attorney, and the Counsel remained under the impression that the time requested had been granted. Moreover, no hour is mentioned in the affidavit, of the exact period of the subsequent conversation in the Four Courts; it might have been five minutes before the judgment was marked, or it might have been after; so that there is no evidence of any undue delay on the part of the plaintiff after the leave had been withdrawn. The only rule, therefore, which we can make is, that the judgment be set aside, as having been marked contrary to the reasonable expectation of Counsel, although not in what could be termed bad faith. But, as there was some misleading on the one side, and as we are granting some indulgence to the other, we shall set aside the judgment without any costs by either party; and under the circumstances of the defendant having no defence on the merits, in order to facilitate in every way, and get a speedy decision, we will suspend the general order of the Court, and allow the demurrer to be set down for argument on next Friday.

H. T. 1842.
Common Pleas.
DANIEL
v.
BINGHAM.

CARROLL v. FARRELLY.

Jan. 25.

MR. BURKE moved to amend the title of the declaration, by changing it from Hilary Term 1842 to Trinity Term 1841, in which the defendant had appeared, without prejudice to the rules to plead, so as not to lose a trial at the next Assizes.

Mr. Brooks, Q. C., opposed the motion, on the ground of the plaintiff having been guilty of an irregularity, for which he had given notice to have the declaration set aside: *Topping v. Fuge (a)*; *Barrett v. Barnard (b)*. And because the costs of a demurrer on which the defendant had suc-

The declaration having been entitled of a Term different from that in which the defendant had appeared, the Court granted liberty to amend on payment of costs, but required the rules to plead to be served *de novo*,

the defendant having a claim for untaxed costs against the plaintiff, which when taxed he intended to plead as a set-off.

(a) 1 Marsh. 341.

(b) 2 F. & Sm. 230.

H. T. 1842. *ceded in the Court of Exchequer, in an action between the same parties, for a similar demand of a double rent, had not been taxed, so that the amount could be pleaded as a set-off.*

Common Pleas.

CARROLL

v.

FARRELLY.

DOHERTY, C. J.

There is a very good reason for requiring the rules to be served *de novo*, as the defendant might, by having his costs taxed, have a good defence at the Summer Assizes, which he could not have at the next Spring Assizes. We shall, therefore, give leave to amend, the plaintiff paying the costs of this application, and serving the rules to plead *de novo*.



Jan. 29.

MARA v. MURPHY.

No leave having been reserved, the costs of a party appearing to oppose the motion for changing the venue within last four days of Term, will not be allowed, although he may have been served with notice of the motion.

MR. MACDONAGH applied, within the four last days of Term, to have the venue changed on the common affidavit.—No leave to make the motion had been reserved.

The COURT refused the motion.

Mr. Graydon appeared for the plaintiff, who had been served with notice, and applied for his costs.

DOHERTY, C. J.

It not having been stated in the notice served on you that leave had been given by the Court, their own rule was sufficient to retain the venue without your assistance. We cannot, therefore, give you the costs of appearing.

No rule.

1841.
Queen's Bench.

TIMOTHY MURPHY, in Replevin, v. JOHN LEADER, M. D.

(*Queen's Bench.*)

Mich. Term.
Nov. 22, 24.

REPLEVIN.—This was an action of replevin for the taking of two cows, two heifers and four sheep of the plaintiff, tried before Serjeant Greene at the last Assizes for the county of Cork.—The taking was stated to have been on the 24th of October 1840 on the lands of Glonnalougha, in the county of Cork. The defendant pleaded several avowries for rent in arrear, due to him as landlord of the *locus in quo*, by the plaintiff, under a demise theretofore executed. The plaintiff in replevin pleaded *non tenet* to each avowry. No question arose upon the pleadings. The issues being on the defendant, he produced and proved a lease of the 1st of January 1796 from Denis Mc'Carthy and wife to John Leader the elder, for three lives renewable for ever, two of whom are in being, of the lands of Glonnalougha, otherwise Lakeville. He then produced and proved a lease from the said John Leader the elder, dated the 15th of September 1827, to Timothy Mulcahy and Owen Linane of the *locus in quo*, being part of the above lands in respect of which the rent claimed fell due. He then proved the deaths of Linane and Mulcahy, and that Timothy Murphy married Linane's widow, and was in possession nine years. He then proved payment of rent by Timothy Murphy under that lease to John Leader the elder. He then produced John Edward Herrick, Esq., who proved that he was a subscribing witness to a deed, bearing date the 19th of August 1836, by which John Leader the elder purported to convey to his son John Leader the younger all the lands comprised in the lease of 1796, in consideration of an annuity of £58 a-year for the life of old John Leader, which annuity was expressly charged on the lands. An objection was taken to the stamp upon this deed, but it was not relied on in argument. The witness then proved that John Leader the younger died on the 16th day of December 1839, before his father; that old Mr. Leader had a daughter Abina, who is married to Mr. Edward Murphy; she is the heiress-at-law both of father and son. That young Leader made a will. Witness directed the memorial of the deed of 1836 to be prepared after the death of young Leader

A. being seized of certain lands for lives renewable for ever under a lease of 1796, conveyed all his interest in these lands to B. in consideration of a certain annuity, by a deed bearing date the 19th August 1836; in 1839 B. died leaving A. surviving him, having previously made his will, whereby he devised and bequeathed the lands of Glonnalougha, part of said lands, to C. and D. for a term of 500 years, to the use of B. for life with remainders over, and appointed C. and D. executors of his will: after the death of B., C. executed a memorial of the deed of 1836, and had it registered upon 17th February 1840; in May 1840 A. conveyed these lands, amongst others, to the use of other persons in derogation of the

conveyance made to B., and this deed was registered upon the 14th of May 1840; *Held*, upon a conflict of priorities between these two deeds that C. was entitled, within the meaning of the Registry Acts (6 Anne c. 2, and 8 G 1, c. 15) to register this deed, both in his character of executor to B. and also in his character as assignee of B.—*Held also*, that the Registry Acts ought to receive an equitable construction.—*Held also*, that the rule of giving an equitable construction to acts of Parliament passed for the public benefit, in order to extend the remedy and suppress the mischief contemplated by the act, is a well established and subsisting rule, and is not affected by *Brandling v. Barrington*, 6 B. & C. 475.

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the grantee, and before the death of old Leader the grantor ; witness in fact might say that he prepared the memorial himself—and stated that the certificate on the back of the deed is the usual certificate put on registered deeds. The defendant then gave in evidence the probate of the will of young John Leader and a consent in the cause, to admit the probate granted by the Court of Prerogative, without producing the original, will and also to admit an attested copy of the memorial of the deed of 1836, which was then given in evidence and was signed by John Leader the defendant, and the registry of which was perfected upon the 17th of February 1840. The will of John Leader the younger appeared to bear date the 24th of May 1838, and by it he devised and bequeathed these lands amongst others to the witness John Edward Herrick and the defendant John Leader, to hold to them, and the survivor of them, and the executors and administrators of such survivor for the term of 500 years, upon the trust to the use of defendant John Leader for life, with remainders. The defendant then gave evidence to shew that possession followed to John Leader the younger, under the deed of 1836, and the Counsel for the defendant then closed his case, submitting that the avowries were sustained.

The plaintiff then offered in evidence a deed dated the 12th of May 1840, and made between John Leader the elder of the first part, Henry Richard Bourke of the second part, and Abina Murphy of the third part, whereby the said John Leader the elder conveyed those lands amongst others to the said Henry Richard Bourke in trust for his daughter, the said Abina Murphy. This deed was duly registered on the 14th of May 1840. Counsel for the plaintiff then contended that the deed of 1836 was not duly registered, for the following reasons :—first, because the memorial was not executed by either the grantor or the grantee, who were the only parties to the deed ; secondly, that the execution of the memorial by the defendant as a devisee was not in compliance with any of the Registry Acts ; and, thirdly, that the memorial itself was not in conformity with any Registry Act. On these grounds he contended that the deed of 1836 was an unregistered deed, and fraudulent and void as against the subsequent registered deed of 1840.

Counsel for the plaintiff then called upon the learned Judge to direct the Jury to find a verdict for the plaintiff, which his Lordship refused to do, and he directed the Jury to find a verdict for the defendant, subject to the two points which he saved—namely, first, whether the deed of 1836 was duly stamped ? and, secondly, whether it was duly registered, so as to give it priority to the deed of 1840 ?

The Jury accordingly found a verdict for the defendant.

These two points were saved, with liberty to the plaintiff to move to have the verdict for the defendant turned into a verdict for the plaintiff, in case either of the two points should be ruled for him.

A conditional order had been obtained on a former day for this purpose, grounded upon the second objection, against which—

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Queen's Bench.

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LEADER.

Mr. *Henn*, Q. C., and Mr. *Keller*, for the defendant now shewed cause, and cited *Pierce v. Hopper* (a); *Rex v. Faraday* (b); *Eyston v. Studd* (c); *Isherwood v. Oldknow* (d); *Rogers v. Humphreys* (e); *Lampet's case* (f); *Dwarris on Statutes*, 718; *Vin. Ab. T. Statute. E. 6, Pl. 55: Bac. Ab. T. Stat. 1, 6; Co. Lit. 290, b.; Bac. Ab. T. Assignment, 330; Co. Lit. 215, a.; and referred to the 6 Anne, c. 2, 8 G. 1, c. 15, and 32 Hen. 8, c. 34.*

Mr. *Bennett*, Q. C., and *Smith*, Q. C., with whom was Mr. *Martin*, for the plaintiff, cited *Brandling v. Barrington* (g) against giving an equitable construction to statutes; and upon the general question, *Warburton v. Ivie* (h), *Fury v. Smith* (i); *Earl of Derby v. Taylor* (k); *Maunsell v. Russell* (l); *Mayor of Carlisle v. Blamire* (m); *Crusoe v. Bugby* (n); *Wilson v. Knubley* (o), and *Co. Lit. 385.**

PENNEFATHER, C. J., this day delivered the judgment of the Court. The question in this case turns upon the construction of the Registry Acts, and the question raised between the parties in the present action is, whether a certain deed bearing date the 19th of August 1836, and executed by John Leader the elder to John Leader the younger, was or was not duly registered upon the day the memorial bears date, pursuant to those statutes; and whether Dr. John Leader, the defendant, who was the person who executed that memorial, had such an interest in the lands comprised in that deed, as entitled him to register that instrument. It appears that John Leader the younger died in the year 1838, not having executed any memorial, or in anywise registered this instrument; that he previously made his will, and thereby devised or bequeathed the premises in this deed to Dr. John Leader and John Edward Herrick, for a term of five hundred years, to the use of Dr. Leader for life, with remainder to

(a) 1 Str. 253.

(c) Plow. 467.

(e) 4 Ad. & E. 299.

(g) 6 B. & C. 475.

(i) 1 Hud. & B. 735, 756.

(l) 2 Ir. Law Rep. 205, note.

(n) 3 Wils. 234.

(b) 1 B. & Ad. 275, 281.

(d) 3 M. & Sel. 332.

(f) 10 Co. 47.

(h) 1 Jones, 313.

(k) 1 East, 502.

(m) 8 East, 487.

(o) 7 East, 128.

* It would be superfluous to give the arguments of Counsel, as they are all reviewed, in the elaborate judgment of the Lord Chief Justice.

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his first and other sons, and several remainders over. It was argued by Mr. Keller that the effect and operation of that will, was to give to Dr. Leader an estate of freehold in these premises; but I do not agree in that position, the interest he took being, in my opinion, an estate for his life, provided the term of five hundred years should so long last. However, this was a chattel interest in the whole of the premises; and by his will, John Leader the younger appointed Dr. Leader and Mr. Herrick his trustees, and also nominated them as his executors; and, therefore, Dr. Leader was joint tenant in a chattel interest for a term of five hundred years; and, thus, Dr. Leader had a beneficial interest in the whole of these premises for the term of his natural life; provided the term should so long last, and he was at the same time co-trustee and co-executor in the will of Mr. Leader the younger. After the death of Mr. Leader the younger, a lease was executed to Burke by the elder Mr. Leader, and that lease was executed in derogation of the interest he had vested in Mr. Leader the younger, and was so far as the deed of 1836 fraudulent, and one against which, those claiming under the latter deed might well take advantage of the Registry Acts to defeat: this deed was executed and registered upon the 14th of May 1840. Then the registry of the deed of 1836 bore date upon the 17th of February 1840, and was, therefore, in point of date prior, and if valid, it must take precedence of the deed registered upon the 14th of May 1840, and confer a prior, and, therefore, a better title. It is alleged, upon the part of those claiming under the latter deed, that it must prevail over the prior deed, there being no registry of that deed but that in February 1840, and that registry not being in pursuance of the Registry Acts, viz., the 6 *Anne*, c. 2, and 8 *G.* 1, c. 15. The 6th of *Anne* is a most particularly advantageous act for the benefit of the public, to secure purchasers against private fraudulent conveyances. His Lordship having read the title of the act, said, the object and purport of the act, as appears by its title, was most comprehensive and general, and so much so, that it was as comprehensive and general as fraud itself could reach. His Lordship having then read the preamble, said the 3rd section was a very important one, and seemed to have been prepared and conceived with the same general object and comprehensive spirit, as the title and preamble of the statute. Having read this section his Lordship said, that although the words in this section were "deeds and conveyances," it had been expressly held that every kind of instrument—equitable as well as legal—was capable of being registered under this act, although not conveying a legal or absolute estate or interest, and although it lies only in covenant or agreement. This was decided upon the construction of the words "deeds and conveyances," which if this act were construed literally, would not include equitable contracts: and that was the decision come to in *Bushell v. Bushell* (a); in which case Lord

(a) 1 Sch. & Lef. 102.

Redesdale distinctly stated this to be his construction of these statutes. It is to be observed, further, that in making this provision there is no restriction or exception of any particular species of deed; the words are "all deeds and conveyances whereby any lands, &c., may be any ways affected," whether the premises shall pass by the particular deed or not, or whether or not they passed at the time of the execution of the deed, or whether or not they were then affected by the deed; in every case what is the consequence? that all lands, &c., may "at the election of the party or parties concerned," be registered in the manner thereafter mentioned. Nothing can be more general than this, and it is in perfect unison with the title and preamble of the act, which shew the object of the statute.

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The question then is, whether, when the statute is thus general in its language, capable of extending to the case before us, the operation of the act is to be extended to the case of Dr. Leader's registration? In doing so, we will do nothing that will contradict or be inconsistent with the title, preamble, or the 3rd section of the statute; the words are—"at the election of the party or parties concerned;" and it appears to me that the object of the act will be best consulted by so extending it, and the words of the statute will certainly not be overstrained. The case of *Brandling v. Barrington* (a) was cited, for the purpose of shewing that an equitable construction of a statute should not be adopted; and it has been pressed upon us that that long established rule of construction of acts of Parliament passed for the benefit of the public, is "more honored in the breach than in the observance;" but I must pause before I yield to that doctrine. When an act is passed for the public benefit, I hold that the words of the statute are to be extended in order to repress the mischief and advance the benefit; this is a rule established in very old cases of the highest authority, sanctioned by modern cases, and there is no modern case to contradict it: a caution may have been thrown out from the Bench, that there should be care in thus extending the words of the statute, not to allow an act to be extended to a case never contemplated by the Legislature in enacting it. The case I have just referred to, and which has been relied on, was in its immediate decision a perfectly well-founded decision; and the attempt that was made to extend the statute in that case was a perfectly wild attempt, and the observations of Lord Tenterden, and of the other Judges, were quite warrantable in that particular case. All the Judges in that case expressly said was, that such a case as the one then before them was never in the contemplation of the Legislature in framing the act, but that extending the statute to that case would be legislation, not construction; and I quite agree with them; but that case leaves the rule untouched, that where a case is within the object and contemplation of a statute—although not within the words—it shall,

(a) 6 B. & C. 475.

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by an equitable construction, be held to be within the remedy of that act; *Vin. Ab. T. Stat.* p. 32, *B. C.*; *Com. Dig. T. Parlt. R.* 13, 15; and what Chief Baron Comyns lays down is this, that "the Judges expound a case within the mischief and cause of an act, to be within the statute, by equity, though it be not within the words;" *Ibid. R.* 13; and in *Plowd. Com.* 465 to 467, two pages and a half are filled with instances of decisions to the same effect. I do not think that the case of *Brandling v. Barrington* was intended to interfere with the established rule, and the leading rule in the construction of statutes; and it is somewhat remarkable that the very same statute referred to in that case came before Lord Eldon, no mean lawyer, and he gave a construction to that act which the words alone did not authorise. That occurred in the case of *Dickson v. Smith* (a), where that learned Judge decided that a sequestration out of Chancery was in the nature of a writ of execution; and in that case the sequestrators were directed to pay a year's rent, which in *Brandling v. Barrington*, the Court very properly refused to direct. The cases are innumerable, both ancient and modern, to sustain this equitable construction of statutes; and I am, therefore, of opinion upon the language of the Registry Act, its title, preamble, and third section, that it is perfectly plain that it was within the object and meaning of this act of Parliament, to give to all persons any way interested in lands affected by an instrument, a right to register such instrument, if the parties think proper to do so; and where we are called upon to give a construction to subsequent parts of a statute, we are not to put out of our consideration previous enactments in the same statute. The next section to be remarked upon is the 6th section, and if there was nothing in the act before the 6th section, there would be much force in the objection to our giving such an equitable construction to this statute, as to bring the present case within it; if we did not carry on the 3rd section in aid of our consideration of the 6th section of that statute. The argument on behalf of the defendant is, that the words "deeds and conveyances" in this section are confined to the parties or privies to such deeds or conveyances, and that they could not be registered by any one unless by the grantors or grantees or their trustees or guardians; but to advance the remedy of this important statute, we must extend them in order to give effect to the words "party or parties concerned" in the 3rd section. The words of the 6th section are "under the hand and seal of some or one of the grantors or some or one of the grantees, his, her, or their guardians or trustees;" not making the power a *personal* power, or requiring it to be exercised by all the grantors or all the grantees; moreover, there is any thing but strictness in the language of the statute; and in some parts of it the words "grantor and grantee" are used, and in others "immediate

(a) 1 Swans. 457.

grantor and grantee," and one may, therefore, say that the previous expression includes a person who is not an immediate grantee. It must also be observed that the 6th section has received a very material explanation by the 8 G. 1, c. 25; that is a declaratory act, and when that statute declares that "it shall and may be lawful to and for the heirs, "executors or assigns of such grantee or grantees, devisees or devisees, or "for some or one of them, to sign and seal a memorial of such deed or "deeds," &c., when it gives that explanation of what the law was under the previous act, and makes a statutory declaration of the meaning of that act, what is to be the effect of that declaration? First, that we are to give that interpretation and operation to the 6th of *Anne* which the 8 G. 1 declares to have been the meaning of the Legislature in enacting it; and, secondly, what is then the meaning of the 6th section? Does not this statute remove all the difficulty and inconsistency between the 3rd and the 6th sections? It declares what is and ought to have been the effect and operation of that 6th section, and that it should have been held to include in it "heirs, executors, administrators, assigns, devisees," &c., of such persons as are mentioned in that section. The next consideration is, whether Dr. Leader is a person coming within the description of any of the persons mentioned in that section, as I have just construed it? In the first place, being an intermediate grantee, although not directly so, it would not be an overstraining of the act to hold him a grantee within the meaning of the acts. He is not heir; but he bears one or other of two characters; he is one of the executors of John Leader the younger, and by the operation of the word "executors" he stands within the provision of the statute which enables him as executor to execute the memorial and have it placed upon the file; but in the next place, there is another view, namely, that he sustained the character of an assignee, in which case he would also be entitled and be able to register this deed. Some cases have been cited, and particularly the *Mayor of Carlisle v. Blamire* (a) for the purpose of establishing that the Court ought not to hold the defendant here an assignee, upon the ground that he has only a partial interest in the premises in the deed; but let any one read that case, and the only thing that will be found surprising is, how any person could call the party in that case an assignee. The *Earl of Derby v. Taylor* (b) was also cited for the same purpose, but that case is equally plain, and nobody could doubt or question that the person sought to be charged as assignee was only a sub-lessee by virtue of an under lease; and I do not think, with great respect for the gentlemen who cited these cases, that they have any bearing upon the question at present before the Court. The next case relied on was *Wilson v. Knubley* (c); and, in my

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(a) 8 East, 487.

(b) 1 East, 502.

(c) 7 East, 128.

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mind, it has very little more to do with this case than the two former. This case was cited upon the objection to our giving an equitable construction to the statute, and ought to have been referred to before; in that case, for manifest reasons, the Court held that the case was not one within the statute at all. I think upon these grounds, therefore, that Dr. Leader is within the word "assigns" in the statute; he is not an assignee as to all the premises; nor is he an assignee in law for all purposes; but he is an assignee within the meaning of these statutes. There is no instance more familiar than that of a conveyance to one for life, with power to lease, remainder to another for life, with remainders over; the tenant for life executes the power, and the remainder-man is not an assignee; the rent is payable to the tenant for life and to his heirs; the remainder-man is not his heir; I am putting that case, and yet he may maintain covenant and distrain; *Harcourt v. Pole* (a); *Gore v. Roper* (b); and in *Whitlock's case* (c), the same principle was laid down under much stronger circumstances; and also in *Hotley v. Scott* (d) and in *Isherwood v. Oldknow* (e). If it be alleged that the present case is the case of a chattel interest, as Dr. Leader only took a legal estate in the term of 500 years, and that these cases are all cases of freeholds, that, I would say, is a distinction without a difference. In *Rogers v. Humphreys* (f) it was established that to make a party an assignee, it was not necessary that he should have a freehold reversion, but that a reversion for a very small number of years, namely, seven years, was sufficient; and that case affords a strong instance of how far the Courts will go in the remedial construction of acts of Parliament; and *Co. Lit.* 215, a., is to the same effect.

Upon these grounds, it appears to us, that the defendant came within the description and meaning of the acts of Parliament, and that in both characters, as executor and as assignee, he was entitled to register the deed under which he claims; and, therefore, that the prior deed ought to hold its priority.

Cause allowed with costs.

(a) *Ander.* 273.

(c) 8 *Rep.* 71.

(e) 3 *M & Sel.* 382.

(b) *Sir T. Jones*, 27, 35.

(d) *Lofft's R.* 316.

(f) 4 *Ad. & E.* 299.

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THE QUEEN, at the Relation of ROBERT HENRY KINAHAN,

v.

The Right Honorable the LORD MAYOR of the City of Dublin.

June 5.
Nov. 18.

MANDAMUS. This was a motion to shew cause against a conditional order, which had been obtained on a former day, for a *mandamus* to the Lord Mayor, commanding him to convene a meeting to elect a Treasurer in the room of Henry Farran Darley, against whom the Court had pronounced judgment of *ouster* last Easter Term.

The conditional order had been obtained on two affidavits, viz., that of R. H. Kinahan, Esq., and George Studdert, Esq. The former stated, that at the election in 1836, William Smith was declared duly elected; that H. F. Darley instituted proceedings against him, upon the ground that he had the greater number of votes—the votes of some Divisional Justices which were tendered for him having been improperly rejected, and that upon an information in the nature of a *quo warranto* against Smith, judgment of *ouster* was pronounced against Smith, and said Darley subsequently admitted to said office by virtue of a writ of *mandamus*; that R. H. Kinahan obtained leave to file a bill in the nature of a *quo warranto* against Darley for usurpation of said office, upon the ground that all the Divisional Justices did not attend said election, and although within summons, were not duly summoned, &c., and that judgment of *ouster* was pronounced upon that information against Darley, and had been duly signed; that in consequence of the judgment against Smith and Darley, there was no person in possession of the office, properly responsible to the public; and that the writ of error brought by Darley upon the judgment pronounced against him was brought for the purpose of delay. Mr. Studdert stated, in his affidavit, that he was one of the Divisional Justices before and at the time of the election of 1836, and he never did, as such Justice, attend any meeting of the Board of Magistrates of the County of the City of Dublin: and that he was not at any period of the year 1836 convened or called by any notice or public advertisement from the Lord Mayor, or from any other person whatsoever, to attend a meeting of the said Board of Magistrates for the purpose of

A. and B. were candidates for the office of Treasurer of the public monies of the city of D.; and A. having been elected, B. brought an information in the nature of a *quo warranto*, against him, and obtained judgment of *ouster* against him, and was subsequently admitted into said office by virtue of a writ of *mandamus*.

C., a third party, then filed an information against B. for usurpation of said office, upon the ground that B.'s election was void, some of the electors who were within summons not having been summoned to the meeting at which he was elected, and not having attended said meeting, and judgment of *ouster* was pronounced by this Court against B. upon this

information. B. brought a writ of error to reverse this judgment, and C. applied to this Court for a *mandamus* to the Public Officer to hold a new election, upon the ground that there was then no rightful Treasurer in the office, the former election being void, upon the conceded facts in the case:—*Held*, that although this *mandamus* was not an actual execution of the judgment of *ouster* against B., it was a proceeding consequential upon that judgment, and operating to put it into effect; and, upon that ground, that between the parties to that judgment, it would operate as a *supersedeas*; and, between third parties, it was good ground for staying proceedings: and, therefore, the cause shewn against the conditional order for the *mandamus* was allowed.

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electing a person to fill the office of Treasurer, nor did he attend any meeting of the said Board for said purpose, nor did he believe he had any right to be present or to vote upon said occasion.

The affidavit of Mr. Darley, in reply, after admitting the statement of the previous proceedings, as detailed in the former affidavits, stated, that it was impossible that Studdert could state that the notice given of the meeting in 1836 was not a sufficient notice to all the Police Magistrates; that if the present order were made absolute, defendant would be forever prevented from establishing that the said meeting of the Board of Magistrates was duly convened, or how same was summoned; that upon inquiry, upon the 25th of May, no judgment had been then made up upon the information against deponent; that deponent had caused a writ of error to be lodged, and that same had been duly allowed by this Court, and notice thereof given; that said writ of error was not brought for delay, but upon the best opinions of Counsel that could be procured, with a view to ultimate success; that all the Justices, with the exception of Mr. Gabbett, who was at the time in Cork, had the fullest notice of the meeting in 1836, and were all canvassed to attend and vote thereat; that deponent waited upon the said George Studdert a day or two previous to the election, and that he was apprised of the election and his right to vote thereat, and solicited to attend at said meeting, which he did not think proper to do; that Arthur Hamilton, also another of the Justices, had notice of said meeting, and might have attended it if he pleased so to do; and that these were the only Police Magistrates within summons who did not attend the meeting in 1836; that Kinahan had no interest in these proceedings, but that the application was made entirely on behalf of Smith, and that deponent was advised, that if this order were made absolute, and the Court of Error should eventually decide that judgment of *ouster* should not have been given against deponent, it would be necessary for him to commence a new proceeding by *quo warranto* before deponent could recover possession of said office.

Sergeant *Greene* now shewed cause against the conditional order. The question in this case is, whether this Court will grant a *mandamus* to the Lord Mayor, directing him to hold a new election, and thus take for granted that the judgment which your Lordships have pronounced in this case is final between the parties, although a writ of error is pending to reverse that judgment. This is a motion to the discretion of the Court, and if there be a doubtful point of law, the Court will not act until that has been disposed of; and even a pending litigation between the parties upon the subject, has always been considered sufficient to prevent the Court from issuing a *mandamus*. *Lovegrove v. Bethel* (a),

(a) 1 Blk. R. 668.

Res v. Hay (a), *Anonymous* (b). Moreover, the Court will regard the writ of error which we have brought as a *supersedeas*. In *Perkins v. Woolaston* (c), it is expressly decided that a writ of error is a *supersedeas* from the time of the allowance of it; and if the defendant have notice before the allowance of it, it is from the time of that notice a *supersedeas*. The distinction between proceedings in a Court of Equity and a Court of Law is well known:—An appeal in Equity does not operate to stop proceedings, but a writ of error does. In *Miller v. Newbald* (d), proceedings against bail, after allowance of writ of error, were set aside; and, in that case, Lord Kenyon said, “A writ of error allowed is, in point of law, a *supersedeas*,” and the same principle was decided in *Meriton v. Stevens* (e), where all the authorities were reviewed. In the present case, the *mandamus* sought for is in the nature of an execution; and suppose an application were made for liberty to sue out execution in a cause in which a writ of error had been allowed, the Court would be bound to refuse it: the allowance of the writ of error being *ipso facto* a *supersedeas*; *Sampson v. Browne* (f). These cases establish that all proceedings in the particular case are stopped by the allowance of a writ of error; and I will now shew that all proceedings incident to the case in which the writ of error has been allowed, are also stopped. *Miller v. Newbald* was a proceeding against the bail in the original action, in which the writ of error was pending; and in *Benwell v. Black* (g), it was held that where an action was brought upon a judgment, to which a writ of error had been brought, such a writ of error operates as a *supersedeas* of a judgment in the second action; a similar decision was pronounced in *Henslow v. Bishop of Sarum* (h), and *Res v. Wheeler* (i); and in *Somerville v. White* (k) it was held that the Court would not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed: but this case has been substantially decided in *Ruding v. Newel* (l), which is in every respect like the present. There is, moreover, a fatal objection to this application, that the judgment has not been signed; *Res v. Corporation of West Loos* (m).

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Messrs. Smith, Q. C., and Napier.

It is conceded in the affidavits that two of the Justices of Police, viz., Hamilton and Studdert, were within summons, and were not summoned to the election by the Lord Mayor, and that they did not attend; the

(a) 4 Burr. 2295.

(c) 1 Salk. 821.

(e) Willes, 271.

(g) 3 T. R. 643.

(i) Temp. Hardw. 91.

(l) 2 Str. 983.

(b) 5 Mod. 374.

(d) 1 East, 662.

(f) 2 East, 439.

(h) Dyer, 76, b.

(k) 5 East, 145.

(m) 3 Burr. 1386.

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election was, therefore, void : *Rex v. Smith* (a). Upon the admitted facts, then, the office is now vacant *de jure*. Then judgment of *ouster* has been given against both, and it has been thereby adjudged that there is no Treasurer *de jure* in possession of the office; and wherever the election is clearly void, the Court will order a new election. The present application is opposed upon three grounds; first, because judgment of ouster is not made up; secondly, that a writ of error is *bonâ fide* brought; and thirdly, upon the ground that the defendant's right would be prejudiced or concluded. As to the first, it is not necessary that the judgment should be formally made up. The cases where the question arose were upon verdict, and the application was before the four-day rule expired. The signing the judgment is the act of the Officer formally recording the order for judgment; *Rex v. West Loe* (b). In the case of a verdict, judgment might be arrested before it is signed; but when the judgment is given by the Court, and recorded by the Officer in the usual way, it is *final* as a decision of the Court; and in a note to *Buckley v. Palmer* (c) it is said that a motion for a peremptory *mandamus* consequent upon a verdict, cannot be moved for four days after the return of the *postea*, as the defendant has so long to move in arrest of judgment. Here the judgment was given last Term, and could not now be altered by the Court: the *obtaining* the judgment gives a party a right to move for a *mandamus*; *Regina v. Gamble* (d), and *Rex v. Baldwin* (e). The writ of error ought to specify the error relied on, which it does not do; it might be that the *quo warranto* is inapplicable to this case, and if so, that would equally apply to the other judgment, and thus shew that there ought to be a new election; *Sims v. Thomas* (f), and *Rex v. Mayor of York* (g). But at most, the writ of error only supersedes actual execution and not the award of execution. In *Snooks v. Mattock* (h) to a *scire facias* the pendency of a writ of error was pleaded, and Littledale, J., said—"The plea is not good; the issuing of a writ of error suspends only the execution, not the award of execution;" and Patteson, J., having expressed a similar opinion, said—"If the plea in bar was allowed, and afterwards the writ of error was determined in favor of the plaintiff, there would be a manifest injustice;" that strongly applies here, where we say if the judgment be affirmed there will be a manifest injustice done; *Rex v. Mayor of Gram-pound* (i); *Rex v. Corporation of Bridgewater* (k). Any advantage

(a) 1 Jebb & S. 632.

(c) 2 Salk. 430.

(e) 3 P. & Dav. 124.

(g) 5 T. R. 76.

(i) 6 T. R. 301.

(b) 3 Burr. 1386.

(d) 3 P. & Dav. 123.

(f) Longf. & T. 24.

(h) 6 N. & Man. 783.

(k) 3 Doug. 379.

expected by the defendant must be formal, for all the facts are admitted which shew his election void. With respect to the third ground of objection, that the defendant's rights will be concluded or prejudiced, the first question is, what are his rights? He is wrongfully in office since the former *mandamus*, and there is no one to overhaul his usurpation. But, moreover, there is no interference with any right he may have; the *mandamus* we apply for is to elect, not to admit, which makes a great distinction in all the cases.—[BURTON, J. The way you put the case is, that the person to be elected is not to go into office, but to bring an action for the fees afterwards.]—No, he might bring his action at once.—[BURTON, J. Would not the writ of error be an answer to such action?]—It would be a stay to the issuing of execution, but it would not operate before judgment; *Rex v. Corporation of Bridgewater*.—[BURTON, J. How does that case apply to a writ of error?]—That is a stronger case, and goes farther than I am contending for, no judgment having been obtained in that case.—[BURTON, J. The objection is that the writ of error operates as a *supersedeas*, the judgment of the Court being questioned.—PERRIN, J. Upon election and entering into recognizance, &c., the elected is *de jure* and *de facto* treasurer, and there is no necessity for a *mandamus*.]—What we contend for is, that there is not now any rightful Treasurer, and although the Court will not act to put Darley out, it will allow a rightful Treasurer to be elected who will be entitled to receive the funds; *Rex v. Mayor of York*.

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As the present Treasurer's election is void upon the conceded facts, and is adjudged void by the Court on the record, he is now in form and substance a usurper. If the judgment be affirmed, then he will have been in wrongful possession, receiving public money without right, and no one to overhaul him. But if the *mandamus* be granted and the judgment of this Court affirmed, then no one will be injured; the rightful Treasurer will get the fees, and the public will have a responsible officer: if, on the other hand, the judgment should be reversed, no one is interfered with. The case of *Lovegrove v. Bethel*, and the other cases cited upon the same point, were decided upon the ground that the Court will not interfere by *mandamus* if there be a civil suit depending. The case of *The Dean and Chapter of Dublin v. Dowgatt* (a) expressly decides that a writ of error of a judgment on a *mandamus*, is no *supersedeas* to a peremptory *mandamus*; *Rex v. Lookup* (b) and *Foot v. Prowse* (c) were also referred to.

Mr. Holmes replied, and referred to *Clerk v. Withers* (d); *Parkins*

(a) 1 P. Wms. 349, 351.

(b) 3 Barr. 1901.

(c) 2 Str. 697.

(d) 1 Salk. 323.

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Nov. 18. v. *Woolleston (a)*; *Capron v. Archer (b)*; *Dudley v. Stokes (c)*; *Jacques v. Nixon (d)*; *Taswell v. Stone (e)*; *Benwell v. Black (f)*; *Cristie v. Richardson (g)*; *Perry v. Campbell (h)*; *Aarons v. Williams (i)*; *Somerville v. White (k)* and *Anonymous (l)*.

BURTON, J., this day delivered the judgment of the Court, and after adverting fully to the facts of the case, his Lordship said, that although the *mandamus* applied for in this case was not an actual execution of the judgment of *ouster*, still it was a proceeding consequential upon that judgment, and operating to put that judgment into effect; but the authorities establish that a writ of error operates not only as a *super-sedeas* to execution, but also as to any step towards execution: *Ruding v. Newel (m)*, *Smith v. Nicholson (n)*, and *Marston v. Halls (o)*. Where the motion is made by a stranger to the judgment; that distinction could only have this effect—that instead of the proceedings being void, they would be such as the Court would stay after the writ of error brought. Upon these grounds, we are of opinion that the cause shewn against the conditional order ought to be allowed; but that will not prevent the applicant, in case of delay upon the part of the defendant, in proceeding upon his writ of error, or for any other sufficient reason, bringing the matter again before the Court.

Cause allowed without costs.

(a) 6 Mpd. 130.

(c) 2 W. BL 1183.

(e) 4 Burr. 2454.

(g) 3 T. R. 78.

(i) 2 Bing. 204; S. C. 9 Meo. 563.

(j) 5 Med. 274.

(n) 2 Str. 1186.

(b) 1 Burr. 341.

(d) 1 T. R. 279.

(f) 3 T. R. 643.

(h) 3 T. R. 290.

(k) 5 East, 145.

(m) 2 Str. 288.

(o) 3 M. & Welsh. 60.

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THE QUEEN v. JOHN MARTIN.

April 27.
Nov. 21.

INFORMATION.—A *certiorari* was issued in this case, from the return to which it appeared that the information in this case was exhibited by Henry Clayton, one of her Majesty's Officers of Excise, upon the 26th of June 1840, before a certain Magistrate of the county of Wexford, and charged, that upon the 8th of June 1840, the defendant carried on the trade and business of an auctioneer, without taking out a license, as is required by the statute, and that he thereby forfeited £100. Upon the trial, before certain Magistrates, said Clayton proved that the defendant, upon the 8th of June 1840, sold two cows by auction in the usual way, acting himself as auctioneer; and that he was a Sheriff's bailiff, and was not licensed as an auctioneer. The Justices acquitted the defendant, upon the ground that as he was a Sheriff's bailiff, and as the sale in question was held under the decree of the Assistant Barrister, he was authorised to act at such sale without being licensed as an auctioneer. From this decision the Commissioners appealed to the Quarter Sessions, where the decision of the Justices was affirmed, and the proceedings were then removed into this Court for final adjudication.

Mr. *Tomb*, on behalf of the Commissioners of Excise, referred to the Schedule to the 54 *G. 3*, c. 82; 6 *G. 4*, c. 81, s. 26; 6 & 7 *W. 4*, c. 75; and 1 *Vic. c. 43*; and to *Paley on Convictions*, 92, 192.

PERRIN, J., this day delivered the judgment of the Court.

His Lordship said :—This was an application on the part of the Commissioners of the Excise to this Court, to quash the adjudication of certain Justices in Wexford, and the affirmation of the Court of Quarter Sessions, on appeal therefrom, declaring that John Martin was not guilty of the offence charged against him in a certain information exhibited upon the 26th of June 1840, by Henry Clayton, an Officer of Excise, for having, on the 8th of June, exercised and carried on the trade and business of an auctioneer in Ireland, without taking out a license, according to the statute, and thereby forfeited a penalty of £100. This information was brought under the 6 *G. 4*, c. 81, s. 26, which enacts, that if any person shall exercise or carry on the trade or business of an auctioneer, or sell goods or chattels, lands, tenements or hereditaments, by auction, without a license, he shall be subject to the penalty of £100 for any such offence. It appeared before the Justices, that the defendant did sell two cows by auction on the 8th of June; that there were several bidders, and that he acted as auctioneer upon the occasion. The defence

It is not necessary for the special bailiff of a Sheriff to take out a license as an auctioneer, or to employ a licensed auctioneer, to entitle him to sell, by public cant or auction, in the usual way, goods taken in execution by him under a civil bill decree; he not being thereby a person carrying on the trade and business of an auctioneer within the meaning of the 6 *G. 4*, c. 81, s. 26.

Quære—Is the 46th section of the 6 & 7 *W. 4*, c. 75, repealed by the 1 *Vic. c. 43*, s. 3?

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was that he was a Sheriff's bailiff, and held the sale as such, under a decree of the Assistant Barrister, and, of course, by special warrant; that in merely so doing he did not exercise or carry on the trade or business of an auctioneer; and that he was therefore authorised to do so by law, without an auctioneer's license, or the assistance of a licensed auctioneer. Upon this the Justices acquitted the defendant, and held him not guilty on that evidence, of exercising the trade and business of a licensed auctioneer. Such was also the judgment of the Court of Quarter Sessions on appeal; and we are called on to quash that acquittal and affirmation, upon the ground relied upon by the Counsel for the Excise, that a bailiff under such decree is not authorised to sell by auction, or levy the amount of the decree, unless he is a licensed auctioneer. We have been referred by the Counsel for the Commissioners to the enactment which I have already stated, and also to the 54 G. 3, c. 82, from the schedule to which it appears there is a duty of ten pence in the pound, payable on the price of all goods and chattels sold by auction, not otherwise therein charged and *not exempt by law*; we were further referred to the 6 & 7 W. 4, c. 75, s. 46, which enacts that the bailiffs to be appointed under that act to execute the decrees of the Civil Bill Court, shall have full power and authority to sell goods taken in execution by them by public auction, without the assistance of a licensed auctioneer; and to the 1 Vic. c. 43, s. 3, which repeals so much of the 6 & 7 W. 4, c. 75, as relates to the appointment of bailiffs to execute those decrees, as provides for payment of fees or poundage to them, and as repeals the 36 G. 3, giving one shilling to the Sheriff for a special warrant; whence it was argued, and we are called on to infer, that before the 6 & 7 W. 4, c. 75, the Sheriff or his special bailiff could not sell goods taken in execution without the assistance of a licensed auctioneer, and that the 46th section of that act is repealed by the 1 Vic., and that the sales which, when executed by bailiffs under that statute, were exempt from the intervention of a licensed auctioneer, are, by this act, when executed by the Sheriff or his bailiff, subject to such intervention. And thence we are called upon to reverse and quash the judgment of the Justices and the affirmation thereof by the Court of Quarter Sessions, and hold that the defendant, in executing a civil bill decree under the Sheriff's warrant, and selling the defendant's goods taken thereunder according to its exigency, in the ancient and accustomed manner by public cant or auction, exercises the trade or business of a public auctioneer, and not being licensed to do so, is subject to a penalty of £100. The consequence of that would be, that no sale under any civil bill decree for any sum, however small, in any part of the country, however remote, can take effect without the presence and assistance of a licensed auctioneer. Now, I am by no means satisfied that the Courts below were in error, or that the Sheriff or other Officer of the Court, in executing the process of the Court, performing his ancient and accustomed duties, in levying its

executions by public sale, does exercise and carry on the trade and business of an auctioneer within the meaning of the 6 G. 4, or 54 G. 3, and is required thereby to take out a license so to do, in order to enable him, when he cannot procure a licensed auctioneer, to act in obedience to the writ of the Court whose Officer he is. When we look to the provisions of that act—the security required by the 7th section of the 54 G. 3, for the delivery of catalogues, &c., and the payment of all sums becoming due for auction duty on such sales—the 11th section, which requires that every person carrying on the trade or business of an auctioneer, whether alone or in partnership, shall be obliged to take out such license, a clause plainly contemplating a trade in which there might be a partnership—the 12th making the duties a charge—the 14th providing for the delivery of catalogues—the 15th for an account of the sales; and the 24th shewing that all sales under executions are exempt from duty, although requiring the auctioneer (that is a public auctioneer if there be one employed) who shall sell goods thereunder, to return an account, and the Sheriffs to certify it—it clearly appears to my understanding, that notwithstanding the section to which we have been referred, goods sold under decrees or other legal process are not liable to duty; and that it was quite a mistake to suppose, as was argued, that by that schedule goods sold by a Sheriff in execution were rendered liable to duty. That they were not while the 6 & 7 W. 4, s. 46, was in force is conceded; the repeal of that section, if it be repealed, which merely affects the auctioneer's license and not the duty on the goods, can hardly be said to render them liable thereto: and that, as before the statute, the Sheriff might and was often bound to sell, himself, and is not by law entitled to charge auctioneer's fees, and as in so doing he could not be considered to carry on and exercise the trade of an auctioneer; and as no duty is payable in respect of such sales, he is not bound to take out a license, paying stamp duty thereon, in order to enable him to execute the duties of his office.

Turning then to the 6 G. 4, c. 81, an act to repeal the duties payable on Excise license, and to impose other duties in lieu thereof and to amend the laws for granting Excise licenses, I find among other trades, in matters or business subject to Excise laws and chargeable with Excise duties, *auctions*, and for and upon every Excise license to be taken out by every person exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, *lands*, tenements or hereditaments by auction, £5;—and in the schedule to the 54 G. 3, lands are chargeable with an *ad valorem* duty on sale by auction; and by the 8th section every such person, &c., beside the auctioneer's license, shall take out a license to deal in, retail, or vend any articles requiring a spirit Excise license, viz., wine, spirits, groceries, tobacco, before he shall sell such goods by auction; or he shall be subject to the penalty for dealing in such articles without license. This enactment is very stringent, and if

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the Sheriff or his bailiff is subject to a penalty for not having an auctioneer's license in every case, he is also subject for not having the license of the particular trader whose exciseable stock he has taken in execution.

I cannot think that it was the meaning or intention of the Legislature to require every Sheriff or other Officer executing the process of the law, to take out such licenses or to procure the assistance of a licensed auctioneer: there is no duty payable on such sales; there was, therefore, no reason to clog the execution of the process of the law by such provisions. The Officer does not exercise the trade or business of an auctioneer when he sells under a *feri facias* or a *venditione exponas*; and although when he uses the assistance of an auctioneer, the sale even then being exempt from duty, the auctioneer must make a return, certified by the Sheriff, to prevent fraud by the auctioneer by interpolating other goods, there can be no danger of such misconduct by a Sheriff, who must pay the proceeds to the party. The statute does not require the Sheriff to use such auctioneer, nor does it forbid him to sell; and although the 46th section of 6 & 7 W. 4, seems to imply that in the creation of a new Officer it was necessary expressly to give him this sanction, yet the inference therefrom appears to be that the subsisting and ancient Officer had that authority (otherwise why confer it upon the new?) rather than that he had not: so that even if that section be repealed, which seems questionable, I think the argument it furnishes is against the prosecution, viz., that previous to it Sheriffs and other Officers had their original authority to sell, unimpaired by those Excise laws passed to regulate certain trades, and raise duties of Excise in respect thereof, and not to interfere with and clog the execution of legal process by the Officers of the respective Courts of Law and Equity. The Masters in Chancery are authorised to sell lands and properties under decrees by public cant or auction, which are exempt from duty; they do not use the assistance of a licensed auctioneer, and they have never been considered thereby to carry on the trade and business of an auctioneer. And if these Officers, in selling those large estates by public cant, are not to be considered to use and exercise the trade and business of an auctioneer, so we are of opinion that a special bailiff, under a civil bill decree, selling to the amount of 5s. or £5, what it his duty to sell, is not subject to the penalty sought to be imposed in this case; and we are, therefore, of opinion that the order of acquittal must be affirmed.

Judgment affirmed.

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BARNABY RUDGE, Lessee of RICHARD EDWARD HULL
 and another,
 v.
 JAMES M'CARTHY.

Nov. 22.

EJECTMENT on the title.—The ejectment in this case was brought to recover the possession of part of the lands of Andrivinagh situate in the county of Cork, and was tried before Serjeant Greene, at the previous Summer Assizes for that county. The ejectment contained two demises, one in the name of each lessor of the plaintiff, and were laid upon the 3rd of May 1841. The title of Richard Edward Hull, one of the lessors of the plaintiff, was admitted by the defendant; and in support of the plaintiff's case a deed, bearing date the 27th of December 1792, was given in evidence, whereby William R. Hull, the father of R. E. Hull, one of the lessors, conveyed the lands in the ejectment to a trustee upon trust for his sons for life, the said R. E. Hull and William Hull, with cross remainders. Plaintiff's Counsel then called upon the Counsel for the defendant to produce receipts for rent, pursuant to the notice, which the latter refused to do. It was then proved that William Hull received rents out of these lands from the defendant and his father up to the time of his death; and that he died in 1824, without leaving any lawful issue. A witness next proved the finding of the deed of 1792 amongst W. Hull's papers, and upon cross-examination admitted that in the search he had found M'Carthy's lease; did not read any name to it but that of the attesting witness, and could not say that the name of R. E. Hull was to it; it was full of erasures and obliterations; saw it in Court this day with plaintiff's Attorney. A notice to quit, dated the 21st of October 1840, calling upon the defendant to give up possession upon the 1st of May 1841, or at the expiration of the current year of the tenancy, was then given in

Ejectment on the title.—A., the lessor, his title being admitted by the defendant, proved a deed of 1792, whereby his father conveyed certain lands, of which those in the ejectment formed a part, to a trustee in trust for the lessor and B. his brother for life, with cross remainders; B. died without issue in 1824, and receipt of rent by him up to that time from the defendant was proved. On cross-examination of one of plaintiff's witnesses it appeared that upon several occasions the defendant shewed to the lessor an instrument under which he

alleged he held the lands, and which the lessor at all times alleged was a forgery; it also appeared that the lessor had in Court either that instrument or some document connected with the defendant's title to the land, which he said was greatly obliterated. A notice to quit upon the 1st of May, or at the end of six months from that day, had been personally served upon the defendant, and a demand of possession made upon the 2nd of May, upon which the ejectment was brought. The Judge who tried the case directed the Jury, if they believed there was a lease or other instrument in writing evidencing the tenancy, to find for the defendant; but if they should think there was not, or that it was altered or obliterated in a material part, to find for the plaintiff; *Held*, that this direction was erroneous; there being no evidence to warrant any question being left to the Jury as to the existence of such instrument, or as to its obliteration or alteration if it did exist; *Held also*, that the facts proved were evidence of a tenancy from year to year, and the receipt of the notice to quit by the defendant without objection, although in the alternative, was evidence of the determination of the tenancy upon the 1st of May, in the absence of all evidence upon the part of the defendant upon either of these points.

Crampton, J., inclined to think that the plaintiff ought to be nonsuited, upon the ground that it appeared upon his own shewing that there was a written document in existence and not produced, evidencing the terms upon which the defendant held.

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evidence. The next witness proved a demand of possession upon the 1st of May, and again upon the 7th of May, from the defendant in person; that he saw an instrument in the hands of the defendant about a year and a half before when he was paying rent to the lessor Mr. Hull; Mr. Hull and the defendant were arguing about it, and Mr. Hull said it was a forgery; the defendant shewed it to Mr. Hull, who had it in his hand; saw it more than once with Mr. Hull and defendant, who were always quarrelling about it; Mr. Hull frequently said the rent ought to be £80 a-year and not £70. The defendant offered witness £100 if he would procure a lease of these lands for him from Mr. Hull.

The plaintiff's case having closed, Mr. *Bennett* for the defendant called upon the learned Judge to nonsuit the plaintiff; first, upon the ground that he had proved receipt of rent under a lease which he did not produce; and, secondly, that no evidence had been given of the time of the commencement of the tenancy: this his Lordship declined to do, but saved the points, and Mr. *Bennett* then addressed the Jury for the defendant.

Mr. *Henn* then called upon his Lordship to direct the Jury to find for the plaintiff, as the only tenancy proved was from year to year, which had been duly determined; this his Lordship declined to do, and told the Jury that if they believed there was a lease or other instrument in writing evidencing the tenancy, they should find for the defendant; but if they should think that there was not, or that, supposing there were, it was altered or obliterated in a material part, they should find for the plaintiff.

The Jury found a verdict for the defendant.

Upon the 5th of November the *Solicitor-General* (Jackson) obtained a rule *nisi* to set this verdict aside, upon the ground of misdirection of the learned Judge to the Jury; against which—

Messrs. *Bennett*, Q. C., and *Collins*, Q. C., with whom was Mr. *O'Hea* for the defendant, now shewed cause, and cited *Brewer v. Palmer* (a) with respect to the written contract between the parties; and *Doe v. Scott* (b), and *Oakapple dem. Green v. Copous* (c), as to the notice to quit.

The *Solicitor-General* (Jackson), and Mr. *Henn*, Q. C., for the plaintiff, referred to *Lessee of Lynas v. Hampton* (d), and *Doe dem. Baker v. Wombwell* (e), as to the service of the notice to quit, although

(a) 3 Esp. 213.

(b) 6 Bing. 362.

(c) 4 T. R. 361.

(d) 2 Jebb & S.; S. C. 3 Ir. Law Rep. 304.

(e) 2 Camp. 559.

the notice was in the alternative, being *prima facie* evidence of the termination of the tenancy, upon the day mentioned therein.

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PENNEFATHER, C. J.

I am of opinion that the verdict had in this case must be set aside, upon the single ground assigned in the conditional order, namely, the misdirection of the learned Judge who tried this case. Whether the learned Judge should have nonsuited the plaintiff or not, is not now before the Court; but simply whether or not the verdict should be set aside, and a new trial directed. His Lordship having read the direction given to the Jury by the learned Judge said, the point upon which I differ from the learned Judge who tried this case is this, that I do not think he had any evidence before him to warrant him in leaving any such question to the Jury as he sent to them. There was no question that the premises were Hull's, and that the defendant was his tenant and had paid rent; and the title of Hull being admitted, and payment of rent being proved, was evidence of a tenancy from year to year; and if that be the only evidence, upon these facts the contract between the parties was clearly a tenancy from year to year. The next thing to be determined is the evidence of the termination of that tenancy. For this purpose a notice to quit was given in evidence, which notice is in the alternative; this notice, however, goes further than the usual form of similar notices to quit, which require that the tenant should give up possession at the end of six months from the gale day next after the service thereof, or at the end of the then current year of the tenancy; for this notice requires the tenant to give up possession upon a particular day, and then goes on and says what amounts to this—"If you shew that a different day was the day of the commencement of the tenancy, then you are to quit six months after the day mentioned in the notice." A demand of possession is then made on the second of May, and both parties appear to consider the first of May as the day upon which the lessor of the plaintiff had a right to enter, and there is no allegation that that was not the day; and in the absence of all evidence on the part of the defendant, I apprehend this was evidence to go to the Jury, that the tenancy commenced upon the first of May; and, moreover, this evidence goes to prove that the contract between the parties was a tenancy from year to year, to be determined by a notice to quit. Now what is there in this evidence, in the absence of all evidence on the part of the defendant, to warrant the Judge in leaving either of the questions he did to the Jury? I am unable to see it. There is no actual evidence of any lease under which the defendant holds, by production of it, or by proof of its existence; and none whatever of any alteration of it: and the Jury are left at random to say whether or not that instrument was obliterated. There was evidence of an instrument being produced about a year before,

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which Hull alleged was a forgery ; and is a man to be obliged to produce an instrument, the validity of which he denies from the first moment he sees it ? This is not the case of a remainder-man as put by Mr. *Collins* ; in such case, no doubt, although the lease alleged to have been made by the tenant for life was not genuine, it is still necessary to produce it ; and it was decided in that case that it will regulate the terms of the tenancy ; but that principle can never be applied as an authority in the present case, for the instrument in question could not do so in this case. But there is a material distinction between the two cases. Upon what principle is the plaintiff bound to produce this instrument, which he from the first repudiates as a forgery ? Can he make it part of his case for one purpose, and then defeat it for any other ? and this, where the defendant had nothing to do but to call upon the landlord to produce it, and thus lay ground for secondary evidence of it, which he does not do ; but he persuades the Judge to leave a question to the Jury upon the subject which ought not to have been left to them. Upon these grounds, I am of opinion, that the verdict had in this case ought to be set aside, and a new trial granted.

BURTON, J., concurred in the judgment of the Lord Chief Justice, and in the reasons stated by his Lordship. In the first place, as to the terms of the tenancy, alleged to be a tenancy from year to year, and the determination of that tenancy ; it appears in this case that the objection is, that the determination of that tenancy is not sufficiently shewn. The notice is a notice to quit at a particular day, and the substance of it is that if the tenant dispute the day, then in the alternative ; and if the notice only required the defendant to quit upon the first of May, there would be no objection to the evidence in this case, for it would be then *primâ facie* evidence that the tenancy commenced upon that day ; but it is contended that the addition of the alternative makes this difference in the case of personal service. I have heard no reason that satisfies my mind that that proposition is well founded : the landlord says that in his opinion the tenancy commenced upon a particular day, viz., the first of May, and brings his ejectment accordingly, and the tenant being aware of it at the time of service, makes no objection ; and the question then is, whether, in the absence of any thing from the tenant, this is not *primâ facie* evidence of the commencement of the tenancy upon the 1st of May, leaving the tenant to give evidence of its commencement on some other day ? That is the way in which I regard this case—founded, in my mind, upon the reason of the thing. Secondly, there being no objection made when possession was demanded, I think that is *primâ facie* evidence that the tenancy was of such a kind as to be determined in that way, namely, a tenancy from year to year. With respect to the third objection, an ejectment is brought against a tenant as tenant from year to year ; he

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is served with a notice, upon the pretence that he is a tenant from year to year; so the landlord insists, either upon the ground that the tenant did not hold under a lease, or if any lease were executed, that it is a void lease. The landlord's allegation in the present case is, that the lease in question is a forgery, he brings his ejectment, and he does not produce that instrument; and then it is said this is a case of a subsisting written contract; and the question is, whether the landlord is bound to produce this forged lease. No doubt, if it be evidence of a written contract between the parties, it must be given in evidence; but what is not a written contract but a fraud and forgery, surely he is not bound to produce that. What injury is done by holding this to be the rule? The defendant well knew the landlord's allegation with respect to this instrument; and either the tenant had the original part in his hands, and, if so, might have produced it—and, if he had not that in his possession, he had the means of enforcing the production of it, by serving notice upon the landlord to produce it—and, if withheld, he could have given secondary evidence of it. It is said, however, that there is a difference in this case, in this respect, that the evidence of the existence of this instrument was extracted in the cross-examination of plaintiff's witness; but it is not true that every thing a party's witness says against him is legal evidence, or that what the witness said in this particular case was evidence of the existence of such a document as the defendant relies upon. I do, therefore, upon these grounds, agree with my Lord, that in this case there was a misdirection in the charge of the learned Judge.

CRAMPTON, J.,

Said he concurred in the rule; but that his Lordship's concurrence did not rest upon all the reasons assigned by his Brethren who preceded him. The real question in this case has not yet been tried, and that is, whether the lease in question was a forgery or not. The question was sent to the Jury in a certain form, and upon evidence upon which the Jury could not find a satisfactory verdict. The inclination of my mind is, that the Judge should have nonsuited the plaintiff; this is a case between landlord and tenant, the latter holding under a lease in the hands of the landlord, and there was no evidence that the tenant had any part of this lease. I think there was evidence that the tenant's part went to the landlord. There was a notice to quit served, and tenancy established and admitted. There was no direct evidence of the commencement of the tenancy; and upon cross-examination of the plaintiff's witness, it was admitted that a lease was in existence under which the tenant held. The same witness proved, that in a conversation between the parties about this lease, the one alleged it was a forgery, which the other denied. This was a case for the Jury. I take the rule of law to be, that where a party comes into Court, and it appears upon his own shewing that there is a written instrument

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between the parties, evidencing the contract between them, if he does not produce it he must be nonsuited; and in the present case, part of the case he had to prove was, that the lease existed and was avoided, exactly as in the case of an ejectment for condition broken. The rule of law upon which this is founded is this, that the best evidence should be given by the party—and this rule sustains the two points made by Mr. Bennett: for this lease, though avoided, would shew the commencement of the tenancy. I do not controvert the position that the tenant's not disputing the tenancy upon the service of the notice to quit on the demand of possession is *prima facie* evidence to the extent stated by my Brethren; but this is not the best evidence. Moreover, I have great doubt that this doctrine applies to alternative notices, but I avoid expressing any opinion upon that subject. There has been dexterity on both sides; but I think the plaintiff was bound to produce the document in the first instance. As, however, the defendant cannot now have a nonsuit entered, upon the other part of the case, I agree in the rule of the Court that there should be a new trial; but as there was a mistake upon the part of the learned Judge who tried the case, I do not think we ought to give costs.

Rule absolute, without costs.

Nov. 2.

In re THORNHILL, Medical Doctor.

Where the coroner of a county gave orders to two medical men, one for £4. 10s. and the other for £2. 10s., and the Treasurer of the Grand Jury paid the former, but refused to pay the latter sum, and the Grand Jury also refused to present for this latter sum, the Court would not give any direction to, or make any order upon the Grand Jury in respect to the sum of £2. 10s.

MR. CAREY applied, on behalf of Mr. Thornhill, for an order upon the Grand Jury of the County of Dublin, to pay him the sum of £2. 10s., under the following circumstances:—The applicant and another medical gentleman were summoned by Mr. Pasley, one of the Coroners of the County, to attend an inquest at Swords; and, having done so, the Coroner signed an order upon the Treasurer of the Grand Jury of the county for £2. 10s. for the applicant, and one for £4. 10s. for the other gentleman who had come a greater distance. The latter sum was paid when demanded; but when Mr. Thornhill applied for payment of the amount of his order, it was refused. It was contended, on behalf of Mr. Thornhill, that the Coroner had a right, under the statute,* to give these two orders for any sums not exceeding £5 each.

The COURT refused to make any order upon the Grand Jury.

No rule.

* The 10 G. 4, c. 37, s. 3, enacts, "That it shall and may be lawful for any coroner before whom any physician, &c., shall, in pursuance of a summons from such

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GEORGE FREDERICK MOWLDS, Attorney,

v.

ROBERT LYNCH POWER.

Nov. 9, 16.

Assumpsit.—The declaration in this case was entitled as of Easter Term 1840, and contained a special count in *assumpsit* for the amount of a bill of exchange drawn by the defendant upon the plaintiff, and which the latter accepted for the accommodation of the former, and was afterwards obliged to pay. The defendant's plea, which was filed upon the 21st of November 1840, stated that the plaintiff, upon the 16th of September 1840, being then a prisoner, filed his petition as an insolvent debtor, praying to be discharged, &c., pursuant to a certain statute, &c., and that upon the same day the said plaintiff, by a certain indenture, conveyed and assigned to the provisional assignee all his estate, rights, &c., to all real and personal estate and effects of the plaintiff, and *which said petition was not dismissed*, and which said indenture was in full force and effect. This plea concluded with a verification. Replication, *precludi non*; because he saith that after he was so arrested, and after he filed his petition and executed the said indenture, and before said plea was filed, to wit, on the 3rd of October 1840, the said plaintiff settled the debt for the recovery of which he was arrested and in prison, as in said plea mentioned, and did not further proceed with his said petition, and was discharged out of prison with the consent of his detaining creditor, and did not obtain his discharge from prison by virtue of any order or adjudication of said Court, whereby the jurisdiction of said Court over the said matter of said petition became determined; and the said assignment became inoperative and void: and concluded with a verification.

In Easter Term 1840, the plaintiff sued the defendant in *assumpsit* upon a special contract, to which the defendant pleaded that after the filing of the declaration, the plaintiff being a prisoner, filed his petition as an insolvent debtor, praying to be discharged pursuant to the Statutes for Relief of Insolvent Debtors, and conveyed and assigned all his interest in all his real and personal property to the provisional assignee, and *that said petition was not dismissed*, and that said in-

denture was in full force and effect. The plaintiff replied, that after he was arrested and executed the said assignment, and before said plea was filed, he settled the debt for which he had been arrested and in prison, and did not further proceed with his said petition, and was discharged out of prison with the consent of his detaining creditor, and did not obtain his discharge from prison by virtue of any order or adjudication of said Court, whereby the jurisdiction of said Court over the said matter of said petition became determined, and the said assignment became inoperative and void. To this replication the defendant having demurred generally, the Court allowed the demurrer, upon the ground that the right to sue was vested in the provisional assignee.

The case of *Evans v. Brown*, 1 Esp. 169, questioned.

"coroner, attend and be examined relative to the death of any deceased person, to grant to such witness an order, signed by such coroner, upon the Treasurer of the county or county of a city within which such inquest shall be held, for such sum, not exceeding £5, as to such coroner shall seem fit; and the Treasurer to whom such order shall be given shall pay the same to the person presenting it; and the amount of every such payment shall be raised off the county or county of the city, by the Grand Jury in like manner as other sums authorised to be presented and levied by such Grand Jury."

See the 6 & 7 W. 4, c. 116, s. 99.

M. T. 1841. To this replication the defendant demurred generally, and the plaintiff joined in demurrer.

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MOWLDS

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POWER.

Messrs. *O'Leary* and *Boyle*, in support of the demurrer.—After referring to the 1 & 2 *G.* 4, c. 59, s. 8, and to the 3 *G.* 4, c. 124, s. 15, the former of which provides that the assignment shall be null and void after the dismissal of the petition, to shew that the petition of the plaintiff not having been dismissed, the assignee was the only person entitled to sue; they cited in support of this position *Willis v. Elliott* (a); *Hamill v. Hannan* (b); *Bailey v. Wilkinson* (c); *Dance v. Wyatt* (d).

Mr. *Fitzgibbon*, Q. C., and Mr. *Blakeney*, *contra*, contended, that although the assignee might prevent the plaintiff from proceeding, the Court would not allow third parties to take advantage of this objection; they cited and relied upon the following cases:—*Webb v. Fox* (e); *Fowler v. Down* (f); *Silk v. Osborn* (g); *Evans v. Brown* (h); *Laroché v. Wakeman* (i). No prejudice can happen to the defendant, as the assignee cannot proceed without the order of the Court of Insolvent Debtors—and that he would not now obtain. *Taylor v. Buchanan* (k); *Kitchen v. Bartsch* (l); *Snow v. Townsend* (m); and *Webb v. Ward* (n).

Nov. 16.

PENNEFATHER, C. J., this day delivered the judgment of the Court.

This case comes before the Court upon demurrer to the plaintiff's replication, and the Court is of opinion that the plea in this case is good, and that the demurrer to the replication must be allowed. This is an action of *assumpsit* brought upon a special contract founded upon a bill of exchange, which the plaintiff accepted for the accommodation of the defendant, and which the plaintiff was obliged to pay. The defendant pleaded, that after the filing of the declaration in this case, the plaintiff filed his petition as an insolvent, a plea in the nature of a plea *puis darreign continuance*, founded upon the statutes for the relief of insolvent debtors; and that plaintiff assigned all his interest in the subject matter of this suit to the provisional assignee; and the plea then avers that said petition was not dismissed, and that said conveyance remained in full force and effect, and concludes with a verification. That is, in effect, what is very obvious from the enactment of the 1 & 2 *G.* 4, c. 59, that the plaintiff's right to continue this suit had

(a) 3 C. & P. 117; S. C. 1 M. & P. 19, and 4 Bing. 392.

(b) 5 Law Rep. N. S. 223.

(c) 2 Doug. 671.

(d) 6 Bing. 486; S. C. 4 Moo. & P. 201.

(e) 7 T. R. 391.

(f) 1 Bos. & P. 44.

(g) 1 Esp. N. P. 140.

(h) 1 Esp. N. P. 169.

(i) 1 Peake, N. P. 190.

(k) 4 B. & C. 419.

(l) 7 East, 53.

(m) 6 Taunt. 123.

(n) 7 T. R. 296.

ended. I may advert to the 8th section of the 1 & 2 G. 4, c. 59, whereby persons may seek their discharge by doing certain things; and amongst other things so provided, is the clause enabling a debtor to execute the conveyance subject to the proviso upon which the present argument has arisen. After stating the plea and replication, his Lordship said that the plaintiff has relied upon the facts stated in this replication, to shew that there was no impediment to his continuing the suit by reason of the Insolvent Acts; and to this replication the defendant put in a general demurrer, which the Court are of opinion ought to be allowed. The Court have come the more readily to this conclusion, because by the provisions of the act of Parliament it was the plaintiff's own fault that this objection should continue to exist, as he might have applied to the Insolvent Court to have the petition dismissed, and then every objection would have been removed; but instead of doing that, he merely obtained his discharge from the detaining creditor. Mr. Fitzgibbon has argued that although the assignee might sue, that that does not prevent the insolvent debtor from persevering in the suit. For this position he cited several cases, and with the exception of one, they were all cases in Bankruptcy; now, nothing can be more distinct than the difference in respect to this question, between the law in Bankruptcy and that under the Insolvent Acts, and for this plain reason, that the Bankrupt Statutes do not contain one word about the dismissal of the petitions. The cases of *Webb v. Fox* (a), *Fowler v. Down* (b), and *Laroche v. Wakeman* (c), were all actions of trover; and it was held that the plaintiff had such a special property in the subject matter of these actions as gave him a right to sue, and which might well consist with the general property in the assignee; and the recovery in these actions might be pleaded by the defendants if they were afterwards sued by the assignee. They are not like the present case; which is an action founded upon a special contract, and the property, which is the subject matter of the contract, is vested totally and entirely in the assignee by virtue of the Insolvent Acts. The case of *Silk v. Osborn* (d) affords no authority for the plaintiff in this case; it is founded upon an exception to the general rule, which is, that where the bankrupt becomes entitled to any thing for his own services, there he may recover: and that rule is founded upon this principle, that the assignee, in such a case, is not entitled to hire out the bankrupt for the benefit of his creditors; but the bankrupt himself is entitled to what he earns in this way. Another decision relied upon was the case of *Evans v. Brown* (e); it is, in my opinion, very questionable whether that case be law, or whether it can be relied upon as an authority for what it decides; but even if it be, it does not rule this case. In that case, the bankrupt lent the defendant a certain

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(a) 7 T. R. 391.

(b) 1 Bos. & P. 4.

(c) Peake, N. P. 120.

(d) 1 Esp. 140.

(e) 1 Esp. 169.

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sum of money after his bankruptcy, and it was held that the defendant was estopped from saying that the money was not the property of the person who gave it to him. Here the contract was before the insolvency, and that distinguishes the present case from the decision to which I have just adverted. If that rule of estoppel ought to prevail in any case, it should not be allowed to prevail in a case of this kind; for in this case the defendant admits the debt, but says that the plaintiff assigned his interest in the debt to another. The next case relied upon was *Taylor v. Buchanan* (a); but it appears to me that this case is as distinguishable as the last from the case before the Court. The contract upon which the plaintiff sued was entered into after the assignment under the Insolvent Act; the case, however, went off upon another question, and the decision has nothing whatever to say to this case; the defendant pleaded a set-off, to which the plaintiff replied, stating the insolvency, and that he the plaintiff was discharged from the debt due to the defendant: it appeared that the plaintiff returned the defendant as a creditor in his schedule only for £8 instead of £44 which he owed him; and then the question was, whether the defendant's debt was not entirely discharged; and the Court held that the discharge only went to the sum of £8, and that the plaintiff should be nonsuited, the residue of the sum due to the defendant being more than the amount claimed by the plaintiff. Another of the cases referred to was *Snow v. Townsend* (b); it does not, however, appear to me that this case has much to do with the present; it was an application to stay the plaintiff, who had been an insolvent, from proceeding, upon the ground that the right to sue was vested in the assignee, and the Court refused the application; it was merely a case where the Court declined to interfere on motion, and it is not applicable to a case like the present, which comes before the Court upon the pleadings. There is another reason for not attaching much importance to that case, which is this, that it is inconsistent with *Webb v. Ward* (c). The last case cited was *Kitchen v. Bratsch* (d); and as far as I understand that case, it appears to me to be rather in favour of the defendant than the plaintiff, and it is a very strong authority against *Evans v. Brown* (e). It is not necessary for us to decide the question in these cases, but the decision to which I have referred leaves the *Nisi Prius* cases from *Espinasse* of very questionable authority. There is no decision in *Kitchen v. Bratsch* to establish that an insolvent can maintain an action like the present, but it proves that the assignee is the proper party to sustain such actions for him. Upon this review of the authorities, it appears to me very clearly, that judgment in this case ought to be given for the defendant, upon the grounds I have

(a) 4 B. & C. 419.

(c) 7 T. R. 296.

(b) 6 Taunt. 123.

(d) 7 East, 53.

(e) Esp. 169.

mentioned. But it is said, although it be the general rule, that the assignee should sue, the plaintiff in this case may notwithstanding sustain the present action, and the 3 & 4 G. 4, c. 124, s. 15, has been referred to in support of this position; and it has been said, that as under this section the provisional assignee cannot sue without the order of the Court, therefore, that the defendant is in no danger of being prejudiced, as the Court would not allow the assignee to proceed. That, however, is an assumption upon which the Court should not act, because this Court cannot decide what the Court of Insolvent debtors would do; but there is another reason why we should not do so, and that is this—that under the English act, 7 G. 4, which contains the very same words, “if the Court should so order,” it has been held that such order is not necessary, and that the assignee may institute proceedings without any such order; *Dance v. Wyatt* (a); these words being merely affirmative of the right of the assignee to institute such suit, given *ex abundanti cautela*: and this is, therefore, no answer to the danger of the defendant being sued twice. Upon these grounds we are of opinion that the assignee is the proper person to maintain this suit, and that after assignment the insolvent does not remit to himself his right of action, and cannot maintain such action until his petition is dismissed.

Demurrer allowed.

(a) 6 Bing. 486.

BASTABLE v. REARDON.

THIS was an application to stay the proceedings in this cause, the action having been brought by an Attorney for the recovery of certain bills of costs, and to have said bills referred to the proper Officer for taxation, upon an undertaking on the part of the defendant's Attorney to pay same when taxed and ascertained. It appeared that there were some taxable items in the bills, but that none of the business charged for was business done in this Court.

Mr. *Freeman*, Q. C., in support of the motion, referred to *Evans v.*

and none of the business has been done in this Court, the Court will stay the proceedings, and refer the bill to be taxed, upon an undertaking by the defendant's Attorney to pay same when taxed and ascertained, independent of the 7 G. 2, c. 14, from the inherent jurisdiction which the Court exercises over its own Officers.

M. T. 1841.
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Nov. 22.
Hilary Term,
1842.
Jan. 11.

Where an action is brought in this Court by an Attorney for the recovery of his bill of costs, and it appears that there is one taxable item in the bill, although that be for business done in some of the other Courts of Law,

H. T. 1842. *Bevis* (a); *Beal's case* (b); *Anon.* (c); *Rex v. Bach* (d); *Watson v. Queen's Bench. Postan* (e); *Williams v. Griffith* (f); *Springate v. Springate* (g); *Tidd's Pr.*, 327, 329.

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Mr. Clarke, contra, cited *Ex parte King* (h); *Burton v. Chatterton* (i); *Clutterbuck v. Combes* (k); *Dagley v. Kentish* (l); *Weymouth v. Knipe* (m); *Rogers v. Peterson* (n); *Hobby v. Pritchard* (o); 1 *Lush's Pr.*, 264.

Jan. 11.

PENNEFATHER, C. J., this day delivered the judgment of the Court.

The notice in this case was served by Mr. Freeman last Michaelmas Term, and the application was to stay proceedings in this cause; the action having been instituted by an Attorney of this Court for the recovery of certain bills of costs, in order that the costs might be taxed, upon the usual terms. This motion was then resisted upon two grounds, first, that the present was not a case within the statute, no part of the business charged for in the bills of costs being business done in this Court; and, secondly, that this Court had no Common Law jurisdiction to make such an order. The analogous English statute upon this subject is the 2 G. 2, c. 23, and the Irish act is the 7 G. 2, c. 14; the words in both in reference to this question are identical—and, therefore, the English decisions bear directly upon the present case. It was not disputed by Mr. Freeman that the Court had no jurisdiction in cases of this nature under the statute, unless some part of the business charged in the bill had been done in this Court, and, therefore, in the present case no question can arise upon the construction of these statutes. Now, although it appears that no part of the business charged in the bills in this case was business done in this Court, yet it appears that the plaintiff is an Attorney of this Court, and that some of the charges in the bills of costs comprise taxable items, and that the present action is brought in this Court; and that being so, although the case is not one within the statute, yet it appears to us that the argument relied on by defendant's Counsel is well founded, that the Court possesses an inherent jurisdiction to pronounce such an order as the defendant seeks for, by virtue of the Common Law jurisdiction, which it has always exercised over its own Officers, wholly independent of any statute. Such is the rule in England, and

(a) 2 Barn. 182.

(b) 12 Mod. 252.

(c) 2 Chitty's R. 155.

(d) 9 Price, 349.

(e) 2 Cr. & Jer. 370.

(f) 8 Dowl. P. C. 414; S. C. 6 Mee. & W. 32.

(g) 1 Salk. 332.

(h) 3 Nev. & M. 437.

(i) 3 B. & Ald. 486.

(k) 5 B. & Ad. 400.

(l) 2 B. & Ad. 411.

(m) 3 Bing. N. C. 387; S. C. 3 Scott, 764.

(n) 7 Dowl. D. C. 187.

(o) 2 Mee. & W. 124.

a *fortiori*, such ought to be the rule in this country ; for in England the several Law Courts have their respective Taxing Officers, while by statute in this country there are one set of Taxing Officers for all the Courts ; and there is, for this reason, less ground for the objection that none of the business charged for was done in this Court. Many cases were cited in the argument, and the fair rule to be deduced from all the cases may be stated to be, that, whether any part of the business charged for in the bill of costs for recovery of which the action has been brought has or has not been done in this Court, if an Attorney of this Court has brought an action in this Court for the recovering of such bill of costs, it makes no matter in which of the Courts the business has been done, if there be taxable items in the bill. All the cases resolve themselves into that proposition, and that turns upon the well established rule which was disputed by the plaintiff's Counsel, viz., that there is an inherent jurisdiction in this Court over its own Officers, to direct the reference which the defendant applies for, upon his offering fair terms,—with this single qualification, that the bill of costs contains at least one taxable item. The rule is substantially laid down as it at present exists in *Hullock on Costs*, 504 ; and the double ground is stated in one short sentence :—"If an action "be commenced in the King's Bench upon an Attorney's bill, that Court "being thereby possessed of the cause, has a power to refer such bill "for taxation, although no one item in it was for business transacted "in B. R.;" and this learned writer, who is himself entitled to great respect, refers to several authorities which fully bear him out, and some of which I will particularly notice ; amongst others, to *Evans v. Bevis* (a) ; and *Ex parte Prickett* (b) ; *Anonymous* (c) ; *Rex v. Bach* ; *Wilson v. Gutteridge* (d). I myself remember the case of *Murphy v. Hayes* (e), before Baron Pennefather, in which an objection similar to that made in this case was relied on ; and that learned Judge said, that this was a jurisdiction founded upon the common law of the Court, and that in the exercise of that jurisdiction the Courts would not suffer its Officers to do injustice. There are other cases in which the Courts of Law exercise a similar jurisdiction ; and a familiar instance occurs in the case of bills of exchange, where it is every day's practice to refer the matter in controversy to the Officer. In *Hobby v. Pritchard*, this principle was not denied. In *Dagley v. Kentish*, it was conceded that the Court has this jurisdiction altogether independent of the statute, with this one qualification, that there are taxable items in the bill. That is quite plain from *Williams v. Griffith*, where that case was re-considered ; and Baron Alderson, in his judg-

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(a) 2 Barnardiston, 182.

(b) 1 New R. 266.

(c) 2 Chitty's R. 155.

(d) 3 B. & C. 157.

(e) Not reported.

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ment, says, "that the rule laid down in the case of *Dagley v. Kentish* "should be adhered to in all cases where the bill contains no taxable items; but that where the bill contains taxable items, the Court have "authority, after action brought, to refer it;" and he goes further, and says, "even without the usual undertaking." No case can be found in which a decision of an opposite kind has been pronounced, either as to a proceeding under the statute, or where the inherent jurisdiction of the Court attaches—that is where the Attorney brings his action in that Court with but one ingredient, namely, that there is at least one taxable item in the bill—not that such item must be for business done in that Court. If there is no taxable item in the bill of costs, the case is then the same as if the action were for the price of a horse, or any other like consideration. In the present case, therefore, although no part of the business charged for was done in this Court—and there is, therefore, no taxable item in the bill of costs for business done in this Court—yet, as there is a taxable item for business done in the other Courts of Law, upon that ground, we hold that the inherent jurisdiction of this Court attaches to make the order which the defendant requires. It is reasonable that the party making an application of this kind should give an undertaking to pay the amount found to be due; and if the defendant in the present instance did not do so, there would be a question as to costs; but that having been done in this case, we are of opinion that he is entitled to carry his motion, with costs.

Motion granted, with costs.

DOE *dem.* JOHNSON v. RUSSELL.

Jan. 22.

In an ejectment on the title, the lessor of the plaintiff gave in evidence a lease of certain ground, bearing date the 4th May 1825, containing a clause of forfeiture in case same was not

EJECTMENT on the title.—This was an action of ejectment tried at the Sittings after last Trinity Term, before Judge Crampton. The lessor of the plaintiff gave in evidence a lease of certain ground, bearing date May 4th 1825, with a clause of forfeiture, to the effect that said lease was to be null and void to all intents and purposes, if not built on within four years; and having proved the forfeiture, closed his case. There were two demises, one on the 5th of May 1829, and the other on the 1st of June 1841. It was objected by the Counsel for the defendant, that

built on within four years, and proved the forfeiture. The declaration in ejectment contained two demises, one upon the 5th May 1829, and the other upon the 1st of January 1841. Upon the trial, it was objected by Counsel for the defendant, that in consequence of the lapse of twelve years, a notice to quit or a demand of possession was necessary to entitle the lessor to maintain his action:—*Held*, that the lessor of the plaintiff was not entitled to bring his ejectment, without at least a demand of possession.

in consequence of the lapse of twelve years which had intervened between the date of the forfeiture and the bringing of the ejectment, notice to quit or a demand of the possession was necessary. The Judge agreeing with him, a verdict was directed for the defendant, with liberty for the plaintiff to have it changed into a verdict for him, if the Court should be of opinion that he was entitled on the whole of the case.

A conditional order to that effect was obtained last Term, against which,

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Mr. *Keatinge*, Q. C., with whom were Mr. *Chambers* and Mr. *Mackay*, shewed cause. The lease was either voidable, or void, on the day of the demise. If voidable then, the defendant had clearly a right to have some notice from the plaintiff of his having made his election to avoid it; *Roberts v. Davey* (a); *Doe dem. Foley v. Wilson* (b). If the lease were void, then we were entitled, in consequence of our long permissive enjoyment, to a notice to quit or demand of possession. *Doe dem. Cates v. Somerville* (c); *Lessee Fleming v. Neville* (d); *Lessee Daniel v. Tierney* (e); *Winterscale v. Newcomen* (f); *Lessee Walker v. Byrne* (g); *Right v. Beard* (h); *Doe dem. Bryan v. Bancks* (i).

Mr. *John Brooke*, Q. C., and Mr. *Dominick McCausland*, contra.

We were entitled to succeed on either of the demises. First, suppose there was only the first demise, the whole question in this, as in every ejectment, was, had the lessor of the plaintiff a right of entry on the day of the demise, viz., the 5th of May 1829; and was that right of entry lost at the time of the trial?—or, in other words, was there a forfeiture on the 5th of May 1829 (which is not disputed); and was there a waiver of that forfeiture? Therefore, the whole and sole question for the Court is, whether a mere acquiescence in the possession of the defendant for twelve years was a waiver of the forfeiture; and that it was not, is clear, from the cases of *Doe dem. Sheppard v. Allen* (k), and *Doe dem. Nash v. Birch* (l), where it is laid down by Baron Parke, that some *distinct act* of waiver is necessary. Moreover, by the Statute of Limitations, 3 & 4 W. 4, c. 27, ss. 2 & 3, twenty years are given in which we may bring our action of ejectment; and yet the argument of the other side is, that by not pursuing our remedy for twelve years, we are precluded from recovering. We had a right of entry on the day of

(a) 4 B. & Ad. 664.

(c) 6 B. & C. 126.

(e) 1 Jones, 256.

(g) 3 Law Rec. N. S. 68.

(i) 4 B. & Al. 401.

(b) 11 East, 56.

(d) Hayes, 23.

(f) 1 Jones, 496.

(h) 13 East, 210.

(k) 3 Taunt. 77.

(l) 1 Mees. & W. 402.

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the demise; and the bringing of our ejectment was, therefore, all that was necessary; *Goodright v. Cator* (a); 1 *Wms. Saund.* 287, n. 16, our entry being confessed by the consent rule. A demand of possession or notice to quit is sometimes necessary to create a right of re-entry; but where a right of re-entry has been given by deed, as in this case, how can they be necessary? The argument must be, that the defendant has become a tenant from year to year or at will, when the only question in the case is, whether he is a tenant under his lease or a trespasser? If he is allowed to make such an argument, it must be on the presumption that he has a right to say his lease was void in 1829, which he is not allowed to do, on the principle that he would be taking advantage of his own wrong; *Rede v. Farr* (b); *Arnsby v. Woodward* (c); *Doe dem. Nash v. Birch*. None of the cases of permissive occupation cited on the other side, can be of any authority in this case; for in all of them a demand of possession was held necessary, on the principle that a tenancy at will had been created by the acquiescence in possession; whereas, in this case, there can be no question about a tenancy at will, as the whole question is, whether the lease is subsisting or not. But the question of permissive occupation is got rid of by turning to the second demise of the 1st of January 1841; for this is a continuing forfeiture, and the houses not having been built on that day, we had a right of entry, which cannot be said to have been waived; *Doe dem. Bryan v. Banks*. The analogous cases of mortgagee and mortgagor, where it is ruled that the former may bring an action of ejectment against the latter without a demand of possession, shew what the law is; *Doe dem. Roby v. Maisey* (d); *Doe dem. Giles v. Fisher* (e). A comparison also of the cases of *Lessee Walker v. Byrne* and *Lessee Pilkington v. Talbot* (f), will illustrate the principle for which we contend.

PENNEFATHER, C. J.

The facts of this case are as follows:—A lease was made in 1825 for 900 years by Johnson to Russell, reserving rent previously reserved by a former lease, and payable out of adjoining premises, and also a pepper corn rent. It was agreed by a strongly worded condition, that a certain number of houses should be built within four years, or that in default, the lease should become null and void to all intents and purposes; but it is not questioned but that the lease did not become void, but only voidable by reason of the houses not having been built. The case may be argued two ways; first, that by virtue of these words the lease became void in 1829, and, therefore, that the lessor of the plaintiff had a right to bring his ejectment, laying his

(a) Doug. 478.

(c) 6 B. & C. 519.

(e) 5 Bing. 421.

(b) 6 M. & Sel. 121.

(d) 8 B. & C. 767.

(f) 5 Law Rec. N. S. 11.

demise in 1829, and it is insisted that he has a right to recover on that demise; or if it was voidable, that he has a right to recover on the demise of 1841: but in either way, we think, the plaintiff could not maintain an ejectment without a previous demand of the possession. Suppose the lease to have determined absolutely in 1829, if the ejectment had been brought at that time it might have been sustained without a demand having been made; but if the landlord lies by and suffers the tenant to remain in possession for a number of years, the case alters and presents a very different aspect; for, by reason of the acquiescence, it would be most unfair to treat him as a trespasser. If he should recover, the tenant has been treated conclusively as a trespasser, and he has no defence to an action of mesne profits in the mean time. It would be making him a trespasser by relation. The hardship is obvious, and would be against law and common sense. Therefore, supposing the lease void in 1829, the ejectment is clearly not maintainable, unless there has been a demand of possession, the tenant having by the acquiescence of the landlord a revived interest of a permissive quality; and the service of the ejectment, according to the authority of *Right v. Beard*, could not be construed to be a determination of it. Suppose on the other hand, that the words of the lease only make it voidable at the election of the landlord; it is said he made his election by having brought the ejectment; but bringing the ejectment did not give him a title to maintain it; and it is a mistake to say, that the only question is as to the legal title on the day of demise. However, until the landlord did some act to take advantage of the forfeiture he was not entitled to treat the tenant as a trespasser. That act might have been by giving him a written notice, or even informing him personally, or by demanding the possession; and not having done so, his title to bring the ejectment had not accrued at the time of serving it. This is common sense, and acknowledged by the authorities; particularly in the judgment of Lord Denman in *Roberts v. Davey*. It is not necessary to go into the other cases and, notwithstanding the arguments for the lessor of the plaintiff, we do not see any thing inconsistent with this view of the case in *Bryan v. Bancks*.

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The question here is, whether the defendant was a trespasser at the time of the ejectment brought. According to the case of *Right v. Beard*, the consent rule could not have the effect contended for by the Counsel for the lessor. It is not, in fact, a determination of the will. I admit that if the ejectment had been brought in 1829 it would have been regular without any notice or demand; for then the election would have been made within a reasonable time; but it is very different where the tenant is allowed to remain in possession for twelve or thirteen years, liable to all the covenants of his lease, and therefore, without any mutuality

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between himself and his landlord. Therefore, the landlord having passed by a reasonable time after the forfeiture becoming complete, the tenant has become, at all events, tenant at will, and that tenancy ought to have been put an end to before the bringing of the ejectment.

Rule discharged.

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 1842.
 Jan. 13.

THE QUEEN v. HOUSTON.

To an indictment for misdemeanour the prisoner demurred, and the Judge of Assize allowed the demurrer; the Crown brought a writ of error, and this Court, in Trinity Term, reversed the judgment of the Court below; in the following Term the Attorney-General moved that the defendant should be brought up to receive sentence; *Held*, that this Court had fully exercised its jurisdiction in reversing the erroneous judgment of the Court below, and that it was not authorised to go further and pass sentence upon the prisoner.

THIS was an application on behalf of the Crown, that sentence be pronounced upon the defendant. It appeared that he had been indicted for a misdemeanour; that his Counsel demurred to that indictment, and had judgment thereon allowing the demurrer at the Assizes; that the Crown then brought a writ of error in this Court to reverse that judgment, and this Court pronounced judgment, reversing the judgment of the Court below in Trinity Term.*

The *Attorney-General* (Blackburne) and Sir *Thomas Staples, Q. C.*, now on behalf of the Crown, moved the Court to pronounce judgment upon the defendant, and contended that the judgment the Court had pronounced was not a final judgment, but left matters precisely in the same position as if the learned Judge who presided at the Assizes had overruled the demurrer; that nothing remained to be done but pass sentence upon the defendant; *Rex v. Taylor (a)*.

Messrs. *Napier* and *O'Hagan, contra*, contended that the only course open to the Crown was to indict the prisoner again; and this course was free from all difficulty, as a plea of *autre fois acquit* can only avail where a party has been acquitted by verdict; 1 *Chit. C. Law*; and *Vaux's Case (b)*. The Court cannot, upon a writ of error, do more than reverse or affirm the judgment of the Court below; *Rex v. Bourne (c)*; *Rex v.*

In a prosecution for a misdemeanour, if the defendant demurs to the indictment and the demurrer is overruled, he has no right to answer over to the offence charged against him, but sentence may be pronounced at once upon him. It is otherwise in cases of felony.

(a) 5 Dowl. & R. 422.

(b) 4 Rep. 44.

(c) 7 Ad. & E. 58.

* See the report of this decision, *ante*, vol. 4, p. 445.

Ellis (a); *Holland v. The Queen* (b); 3 *Inst.* 210: in *Rex v. Ken-northy* (c), there was not, as here, a *final* judgment. Even if the Court have jurisdiction to do any thing more than reverse or affirm the judgment upon writ of error, and that it had the power to sentence the defendant, that ought to have been done last Term as an amendment to the judgment of reversal, and it cannot be done after the interval that has occurred; *Rex v. Carlisle* (d); *Rex v. Justices of Leicestershire* (e); *Holland v. The Queen* (f).

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BURTON, J., this day delivered the judgment of the Court.

Jan. 13.

The indictment in this case was for a misdemeanour, and for that species of misdemeanour called illegal combination and confederacy. A demurrer was taken to this indictment, upon the ground that the conclusion to it being *contra formam statuti*, was erroneous, and that it ought to have concluded *contra formam statutorum*. This demurrer was argued at the Assizes, and judgment given allowing the demurrer; a writ of error was then brought in this Court; and, upon argument, we were of opinion that the judgment pronounced in the Court below was erroneous, and we accordingly decided that that judgment should be reversed. The Counsel for the Crown then suggested that the Court were bound, in addition to the reversal of that judgment, to award a judgment of condemnation, and pass sentence upon the prisoner. It must be conceded that the indictment in this case being for a misdemeanour and not for a felony, and the demurrer thereto having been over-ruled, the prisoner is not entitled to answer over to the offence charged against him, but that judgment may pass against him at once for the crime laid in the indictment. But the question is, whether in a case where a demurrer on the part of the prisoner has been allowed, although erroneously, and this Court has reversed the judgment allowing that demurrer, we are authorised or bound to go further and pronounce sentence upon the prisoner? Or whether this Court has not fully discharged its duty in pronouncing the judgment of reversal? Upon this precise point no case has been cited; but upon the other hand, several cases have been cited to establish this proposition, that when an erroneous sentence has been pronounced in the Court below, this Court will not amend, alter, or correct that sentence, but will merely reverse the judgment of the Court below. The cases to which I refer are *Rex v. Ellis*, *Rex v. Bourne*, and *Regina v. Holland*. In the present case, the judgment below is a final judgment of acquittal; and upon this writ of error that judgment is all we have to deal with: and unless some acknowledged

(a) 8 Dowl. & R. 173.

(b) 2 Jebb & S. 357.

(c) 1 B. & C. 711.

(d) 2 B. & Ad. 971.

(e) 1 M. & Sel. 442.

(f) 2 Jebb & S. 364.

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principle of Crown law make it incumbent upon us to go further, and depart from the general rule acted upon in the cases to which I have referred, we ought to abide by that general rule. The only ground for such a proceeding as that, in the present case, seems to be, that in indictments for misdemeanours, the same rule holds in respect to demurrers as in civil cases; the demurrer is held to be a confession of the facts stated in the indictment, the law only being put in issue, and, therefore, if the demurrer be overruled, the prisoner is considered as not having denied the offence charged against him, but as if he had been found guilty of that offence, and sentence may be immediately pronounced upon him; and that this is the law there can be no doubt. It also appears that in a civil case, where a writ of error is brought by a defendant to reverse a judgment pronounced against him, the Court will only affirm or reverse that judgment; but if the writ of error be brought by the plaintiff, the Court will not only reverse the judgment, if they consider it erroneous, but they will pronounce such a judgment as the Court below ought to have given. And for this reason it may be suggested that the Court ought in this case to follow the same course, considering the prosecutor in a prosecution for a misdemeanour in the nature of a plaintiff in a civil case; but that has not been suggested or argued in the present case, and it appears to us, that without express authority we ought not to act upon such an analogy; and the rather because there is an analogy in criminal proceedings of an opposite kind; for example, in prosecutions for misdemeanours, the defendant may obtain a new trial in certain cases where the prosecutor cannot; we do not think, therefore, that the doctrine which prevails in civil cases upon this subject ought to be extended to criminal cases; and upon these grounds we are of opinion that this Court has properly exercised its jurisdiction by reversing the judgment of the Court below. This will not prevent the prosecution of the prisoner by the ordinary course of law, the demurrer being put out of the question by our judgment of reversal; and all we have now to do is to express our opinion that in this case the prisoner ought to be discharged.

The prisoner was then discharged.

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WALL v. LIGHBURNE.

(*Exchequer of Pleas.*)

Easter Term.
May 6.

MR. ROBINSON, on behalf of the plaintiff, the Rev. R. H. Wall, moved for liberty to take a warrant of attorney off the file, for the purpose of entering judgment thereon in England.

Plaintiff allowed to take a warrant of attorney, on which judgment had been entered, off the file, for the purpose of entering judgment thereon in England, upon the terms of vacating the judgment here.

In Hilary Term 1830, a judgment had been entered in this Court upon the warrant of attorney in question, which was in the usual printed form; but it was now sworn by the plaintiff, that in consequence of the extent to which the defendant's property was encumbered, a judgment in this country would be fruitless.

In support of the application, Counsel referred to the case of *Lindsay v. Rawlins*, cited in *Smythe on Arrest*, p. 56.

BRADY, C. B.

You may take the order, on condition of vacating the judgment in this Court.

The following order was then made :—

Upon motion of plaintiff's Counsel, and on reading the judgment of Hilary Term 1830, for £240. 14s. 8d., and an affidavit, it is ordered by the Court that the plaintiff be at liberty to vacate said judgment, without further motion.*

* A similar order was made in four other cases between the same parties.

LEWIS and PRINGLE v. HYNES.

May 6.

On the 9th of May 1840, the Court, on the application of the defendant, made an order that the affidavit of Luke Maguire, the process-server, should be taken off the file, and handed over to the Clerk of the Crown of the County of the City of Dublin, in order to indict the said Maguire for wilful and corrupt perjury at the next Commission, in falsely swearing to the service of the writ; and that the rest of the motion, which was to set aside the parliamentary appearance and the subsequent

Where the process-server was prosecuted by the defendant, and convicted of perjury, the Court set aside the civil proceedings, with costs, but refused to make

the plaintiff pay the costs of the prosecution.

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proceedings in the cause, should stand over in the mean time. Before applying to the Court, a notice had been served on the Attorney for the plaintiffs, stating that there must have been some mistake with respect to the alleged service of the process upon the defendant, inasmuch as there was another person of the same name and profession residing in the same town; and calling on the plaintiffs' Attorney to vacate the proceedings which had been taken in this action upon foot of such supposed service. With this requisition the plaintiffs' Attorney refused to comply, except upon the terms of the defendant's consenting that the costs of the proceedings so taken should be costs in the cause.

The process-server having been tried and convicted of perjury, the defendant, on the 20th of November 1840, served a notice of motion to set aside the parliamentary appearance, and subsequent proceedings, with the costs of the application in the order of the 9th of May last, and also of the said order, and of the intended application. The notice further stated that Counsel would at the same time move that the plaintiffs might be ordered to pay the costs of the prosecution and conviction of the process-server, which took place in pursuance of said order of the 9th of May. On the 21st of November, the plaintiffs' Attorney served a notice in reply, undertaking to vacate the parliamentary appearance and subsequent proceedings, and offering to pay the costs incurred up to the service of their notice. These terms not having been acceded to on the part of the defendant, an affidavit was filed on the 24th of November by the Attorney for the plaintiffs, stating that Maguire had been recommended to himself and his partner as a fit and proper person to be employed in the service of writs, by several of the Attorneys connected with the county where he, Maguire, resided, and amongst others by the Attorney for the present defendant.

The motion having stood over from Michaelmas Term—

Mr. *Holmes* now moved, pursuant to the terms of the defendant's notice of the 28th of November, and contended that the defendant was clearly entitled to the costs of setting aside the civil proceedings, and submitted also, that, under the circumstances of the case, he was entitled to the costs of the criminal proceedings and of this motion. The defendant had been put to very heavy expenses in prosecuting the process-server, and the result of the prosecution had proved the propriety of its having been instituted. Moreover, previously to any application having been made to the Court, the Attorney for the plaintiffs had been warned of the consequences, and called on to vacate the proceedings by a preliminary notice.

Mr. *O'Hagan, contra.*—The defendant is certainly not entitled to the

costs of the proceedings in the Criminal Court, and it is a very serious question whether he is entitled to the costs of the civil proceedings. With regard to the latter, this Court in *Egan v. Doherty* (a), which is the leading case upon the subject, expressly declined to decide the general question, there being special circumstances in that case which authorised the decision there.—[PENNEFATHER, B. Yes, the Court was not called on in that case to decide the general question.]—It would be a great hardship if a plaintiff were in any case to suffer from the default or misconduct of his agent, unless specially mixed up with him in the transaction. Here there is a strong case for the exemption of the plaintiffs from such a liability, as their Attorneys made every effort to discover the character of the process-server, before verifying the service of the writ. [PENNEFATHER, B.—There was one circumstance which very much influenced the Court in the case of *Egan v. Doherty* (a), and that was, that the plaintiff's Attorney, notwithstanding he had been warned, persevered in his proceedings, and adopted throughout the acts of the process-server. Now, is there not something very like that in the present case? But the plaintiffs here have, at all events, bound themselves by their notice of the 21st November.]—Secondly, with respect to the criminal proceedings, it would be alike against principle and authority to make the plaintiffs pay the costs of them; *M'Kiernan v. Plunket* (b); *Cogrove v. M'Donnell* (c); and in *Egan v. Doherty* (a), the Court intimated a strong opinion that it had no control or jurisdiction over the costs of the prosecution. The plaintiffs having, by their notice, offered every thing but the costs of the prosecution, it follows that unless the defendant be entitled to those costs, the plaintiffs should get the costs of this motion.

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BRADY, C. B.

This comes, substantially, to be a motion for the costs of the prosecution of the process-server; the plaintiffs having, by their notice, offered to pay all the costs incurred but those. Now, we think the plaintiffs ought not to pay the costs of the proceedings in the Criminal Court. The cases are against it, and the Court sees no reason to depart from them. The defendant having, therefore, brought forward his application against the current of authorities, and having failed to

(a) 2 Ir. Eq. Rep. 79.

(b) 3 Law Rec. 1st ser. 104.

(c) 2 Ir. Eq. Rep. 77, n.

E. T. 1841. establish his claim, it is but right that he should pay the costs of the
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It is ordered by the Court, that the proceedings in this cause be set aside; and defendant is hereby declared to be entitled to the costs offered by the plaintiffs' notice of the 21st November last; and plaintiff is hereby declared to be entitled to the costs of this motion: such costs, when taxed and ascertained, to be set off one against the other; and the party against whom a balance shall appear, to pay the same to the other without further motion.

Trinity Term.
 June 11.

Lessee of M'KIERNAN v. SHENKIN.

A party will not be permitted to take defence, whose interest has been acquired subsequently to the service of the ejectment.

MR. WYNNE moved that one T. R. should be at liberty to take defence to the ejectment. His father had been served with the ejectment, but had since then assigned his interest in the premises to his son, the present applicant.

PENNEFATHER, B.

We never grant permission to a party to take defence where his interest has been acquired subsequently to the service of the ejectment.

No rule.

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Lessee of FREWEN v. AHERN.

(*Eschequer of Pleas.*)

May 26.

EJECTMENT on the title for the lands of Sleveen, in the county of Cork. The case was tried before Mr. Sergeant Greene at the last Summer Assizes for Cork, when the lessors of the plaintiff proved the service of a notice to quit which was in the following terms:—"Sir—Inasmuch as "you object to surrender possession of your holding in Sleveen on the "29th instant, insisting that your tenancy did not commence at that time "of the year, now take notice that you are, on the 25th day of March "next ensuing the date hereof, to deliver up unto me, or unto such per- "son or persons as I shall appoint for that purpose, the quiet and peace- "able possession of that part of the lands of Sleveen, in the barony of," &c., "which you hold under Thomas Frewen, Esq., as a yearly tenant," &c., "and should you hold over the possession after said day," &c., "I "will not only sue you on his behalf for double the yearly value," &c., "but I will also, on his behalf, take proceedings to recover possession of "the said lands and premises, according to the statute in such cases made "and provided.—Dated this 18th day of September, 1839.

"EDWARD MATHEWS,

"Agent and Receiver of said Thomas Frewen,
"acting under letter of Attorney from him.

"To Cornelius Ahern," &c.

It appeared that the lessor of the plaintiff was the assignee of a mortgage granted by one E. H. Adderly, the former proprietor of the estate. Mr. Mathews, by whom the notice to quit was signed, was examined as a witness for the plaintiff, and proved that he had received two and-a-half years' rent for Mr. Frewen; and had been paid rent, amongst other persons, by the defendant. He further stated that he had received directions from Mr. Frewen to evict certain of the tenants; but it did not appear that the defendant Ahern was included in the number. No further evidence was given either of Mathews's agency, or of his authority to serve the notice to quit. The case relied on by the defendant was, that his tenancy commenced on the 29th September and not on the 25th March, and in order to prove this he produced a lease from Adderly the mortgagor, bearing date the 29th September 1835. On the face of the lease there appeared several erasures and alterations, one of which related to the time of the commencement of the tenancy. This lease had been executed by the mortgagor pending a Chancery suit, in which a Receiver had been appointed over the lands; and it appeared that Mr. Frewen's agent had the lease for some time in his possession, and had

Where an ejectment was brought by the landlord founded on a notice to quit, signed by his agent and receiver; *Held*, that the subsequent bringing of the ejectment was not, in itself, a sufficient proof or recognition of the agent's authority to serve the notice to quit.

A mere receiver of rents has, as such, no authority to serve a notice to quit.

Where a notice to quit is given by a person who is described therein as acting under a power of Attorney from another; *Sem- ble*—that on the trial of an ejectment brought upon such notice to quit, the power of Attorney must be produced and proved.

A tenant is precluded from disputing his own statement with respect to the commencement of his tenancy.

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procured a copy of it. On the part of the defendant two other objections were taken; first, that it appeared by the notice to quit, that Mathews acted by letter of attorney, which was not produced; and, secondly, that there was no sufficient authority vested in Mathews to serve the notice to quit. The lessor of the plaintiff went into evidence in reply, and produced two witnesses, one of whom (the receiver in the Chancery cause) deposed that in the month of April 1836 he had a conversation with the defendant, in which he said his tenancy commenced on the 25th March 1835; that he got the ground from the widow of a person named O'Brien; and that he went with her to Mr. Adderly to settle the rent, &c.; but he did not mention that he had a lease. The other witness stated that after the service of a previous notice requiring the defendant to quit on the 29th of September 1839, the defendant said "he had received the notice, but that it was of little use, as his term did not commence at that time." In a subsequent conversation with the same witness in June 1839, the defendant stated that "his tenancy commenced in March and not in September." The learned Serjeant left the case to the Jury, telling them that if a tenant misled his landlord as to the commencement of his tenancy, he ought not to be allowed to set up a different case afterwards; adding that the statement of the defendant here (upon which the landlord acted) was at variance with the lease which he produced, and which, if not improperly altered, would be evidence as to the true commencement of the tenancy; and left it to the Jury to say whether any alteration had been made in the lease after its execution. The Jury found a verdict for the defendant, with which the learned Judge expressed himself dissatisfied.

Mr. Bennett, Q. C., with whom were Mr. Collins, Q. C., and Mr. E. Corbet, for the lessor of the plaintiff, now moved to make absolute a conditional order, which had been obtained for setting aside the verdict, and for a new trial. First, the defendant was estopped by his own statement from disputing the commencement of the tenancy; and ought not to have been allowed to give evidence to contradict that statement; *Watson v. Threlkeld* (a); *Robinson v. Nahon* (b); *Doe v. Lambly* (c); *Price v. Harewood* (d); *Bass v. Clive* (e); *Lipscombe v. Holmes* (f); *Watson v. Ware* (g); *Chorley v. Bolcot* (h). Secondly, independent of the letter of attorney, there was sufficient evidence of the agent's authority to serve the notice to quit; he received the rents for the lessor

(a) 2 Esp. 637.

(c) 2 Esp. 635.

(e) 4 M. & S. 13.

(g) 5 B. & C. 155.

(b) 1 Camp. 245.

(d) 3 Camp. 108.

(f) 2 Camp. 441.

(h) 4 T. R. 317.

of the plaintiff; and it also appeared that he had received authority to evict the interest in other premises by ejectment.

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Mr. Henn, Q. C., and Mr. T. Fitzgerald, contra.

First, parol evidence is inadmissible to shew the commencement of the tenancy where the tenant holds by deed or lease, as he did here. The defendant was ignorant of law, and in doubt when his tenancy commenced,—whether it was from his actual entry on the lands in the month of March, or the period mentioned in the lease as the commencement of the tenancy, viz., the month of September. In such a case it would be unjust that he should be estopped by an error or mistake of law. Besides, Mr. Mathews, the agent, had the lease in his possession, and had a copy of it, and so could not have been misled by the defendant's statement; the landlord ought not, therefore, to be allowed to take advantage of it. Secondly, there was no evidence of the agent's authority to serve the notice to quit. A mere receiver of rent has no authority to determine or evict the tenant's interest by the service of such a notice; and the fact of an ejectment being subsequently brought by the landlord, is not a sufficient ratification of the agent's act, or evidence of his authority; *Doe v. Walters* (a); *Doe d. Manvers v. Mixem* (b); *Adams on Ejectment*, 143; *Right d. Fisher v. Cuthell* (c). Thirdly, as the agent professed to act under a letter of attorney, and as the notice to quit expressly referred to it, he was bound to produce and prove it at the trial.

Mr. Collins, Q. C., in reply.—First, the defendant is bound by his statement as to the commencement of the tenancy, and it is immaterial whether such statement be the result of mistake or design, as it may equally have the effect of misleading the landlord: *Doe v. Lambly* (d); *Ainslie v. Medlycott* (e), per Sir W. Grant; *Pickard v. Sears* (f). The deed or lease on which the defendant relies is, as to the lessor of the plaintiff, a nullity—for at the time it was executed a mortgage had been granted, and a receiver under the Court of Chancery appointed. Secondly, the Judge was of opinion that there was sufficient evidence of the agent's authority, and the defendant did not require any question upon that part of the case to be left to the Jury. A subsequent recognition of the agent's act is sufficient evidence of his authority; *Gregg v. Wells* (g); *Goodtitle v. Woodward* (h); *Doe d. Marsack v. Read* (i); *Lesser Conner v.*

(a) 10 B. & C. 626.

(c) 5 East, 491.

(e) 9 Ves. 21.

(g) 2 P. & D. 396.

(b) 2 M. & R. 56.

(d) 2 Esp. 635.

(f) 6 Ad. & El. 474.

(h) 3 B. & Al. 689.

(i) 12 East, 57.

T. T. 1841. *McCarthy* (a); *Doe d. Manvers v. Mizem* (b); *Roe v. Pierce* (c); *Doe Exch. of Pleas. d. Grubb v. Grubb* (d); *Lessee Commissioners of Wide Streets v. ———* (e). Thirdly, the statement at foot of the notice to quit, that the agent acted under power of attorney, is surplusage, and may be rejected—a parol authority is sufficient; *Lessee Lord Sligo v. Davitt* (f); *Lessee Latouche v. Latimer* (g). At all events the Court will not take upon itself, without a new trial, to decide that there is no evidence to go to a Jury of the agent's authority to serve the notice to quit.

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This is an application to set aside the verdict which was had for the defendant in an ejectment brought upon a notice to quit. That verdict, it appears, was found upon questions left to the Jury with respect to the time of the commencement of the tenancy, and as to the fact of the landlord having or not been misled by the representations of the defendant with regard to it. With this verdict the Judge has reported himself dissatisfied, and, I confess, that if the case rested solely on that point, I should concur with the Judge in thinking that the verdict was far from satisfactory, and that the case should consequently undergo investigation before another Jury. For I think that, looking to the whole conduct of the defendant here, it was not competent for him to turn round and make the case set up by him at the trial, by alleging that his tenancy commenced at a different period of the year from that at which he himself had previously represented. But this gives rise to another question, upon consideration of which we conceive it useless to send the case for a new trial, there being no evidence to sustain a material part of it. The notice to quit is signed by Edward Mathews, and in it he styles himself "agent and receiver of said Thomas Frewen, acting under letter of attorney from him." That clearly means that he had a letter or power of attorney authorising the service of the notice to quit, and I might, perhaps, go the length of saying (although it is unnecessary for the purposes of this case to do so) that where a person serves a notice to quit, professing to act under a letter of attorney, he is bound to produce that letter of attorney.—But, independently of that question, I do not think it is proved that Mathews had any authority to serve the notice to quit in the present case. All that appears is, that he was a receiver of the rents of this property; and that he had directions to evict certain persons by name. Now, the name of the defendant not being included among those of the persons so to be evicted, implies, I think, that the agent or receiver had

(a) Batty, 643.

(c) 2 Camp. 96.

(e) 3 Law Rec. 1st Ser. 63.

(b) 2 M. & R. 56.

(d) 10 B. & C. 816.

(f) 3 Ir. Law Rep. 146.

(g) Ibid.

no authority to evict him. A mere receiver has as such no authority to serve a notice to quit; but what has been relied on in the present case is, that there has been a sufficient recognition of the receiver's authority by the bringing of the ejectment; and, undoubtedly, there have been cases, both in this country and in England, which go the length of deciding, that the bringing of an ejectment by the landlord, founded on a notice to quit, served by a person professing to be an agent, is such a recognition. The case of *Lessee Conner v. M'Carthy*, reported in *Batty (a)*, goes a great way to establish that proposition, and so does the case of *Roe v. Pierce*, in 2 *Campbell (b)*. Those decisions are, however, encountered by the subsequent decision of the Court of Queen's Bench in England, in *Doe v. Walters (c)*, in which case that Court was of opinion, that although a notice to quit given by an agent might be recognised on the part of the landlord by something subsequent to the service of it, yet that such recognition must be by something independent of, and antecedent to the bringing of the ejectment. So far from that decision being overruled or impeached, I find it recognised by the Court of Common Pleas in England, in the more recent case of *Doe dem. Rhodes v. Robinson (d)*. That was the case of a notice to quit, given not by the immediate agent of the landlord, but by a person appointed by the agent to receive the rents; and the Court held, that in the absence of a recognition by the landlord of the party's authority to give the notice, the bringing of an action founded on the notice was not in itself a recognition. I take it, then, to be now the settled law in England, that in order to establish the validity of a notice to quit given by an agent, you must shew that he had authority to give it at the time it was served; or, at all events, that his authority must be recognised by some act of the landlord intervening between the service of the notice and the bringing of the ejectment. Now, in this case, there is no evidence of Mr. Mathews having had authority to serve the notice to quit, except the fact of his being the receiver of the rents; but a mere receiver of rents has (as I have already said) no authority, as such, to demand the possession or serve a notice to quit; nor has there been any recognition by Mr. Frewen the landlord of the agent's act, except the bringing of the ejectment, which, upon the authorities I have referred to, is clearly insufficient.

Upon these grounds, then, we think the verdict ought not to be disturbed, being of opinion that if the verdict were to be the other way, the defendant would, notwithstanding, be entitled to the judgment of the Court in his favour.

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(a) p. 643.

(b) p. 96.

(c) 10 B. & Cr. 626.

(d) 4 Scott, 396.

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RICHARDS, B.

I agree in the opinion pronounced by my Lord Chief Baron ; and I think it right to state that I fully and entirely concur in the principle established by the cases which have been cited with respect to representations made by tenants as to the commencement of their tenancy. The principle is a sound one, and one which has been acted on both in Courts of Law and in Courts of Equity. Where a tenant, on being served with a notice to quit, informs his landlord that the notice is ineffectual, because the tenancy commenced at a different time of the year, and, in consequence of such information, the first notice is abandoned, and a new one served, requiring the tenant to give up possession at the time represented by him as that at which his tenancy commenced, he ought not to be allowed to turn round and say that the second notice is erroneous, and that the tenancy commenced at another and a different period of the year. It is true, that it may be argued in *this* case, that the representation made was the tenant's construction of a matter which was as much within the landlord's knowledge as his own, the landlord's agent having had a copy of the lease in his possession, and that this was rather the tenant's opinion upon a matter of law, than the statement of a matter of fact. However, this is not the point on which the case turns. I may also observe, that I was much struck by the peculiar manner in which Mr. Mathews describes himself and his authority in the notice by which he demands the possession, viz., as "acting under letter of attorney" from the landlord. Does not that mean, that in this particular case he had the landlord's authority to demand the possession by virtue of a letter of attorney ? And if so, I am strongly disposed to think he was bound by the terms of his notice to produce the instrument under which he professes to act. But the case must be determined on a different ground.

It is said that the authority of the agent is sufficiently shewn by the subsequent recognition of the landlord in bringing an ejectment founded upon the notice to quit. The doctrine of a subsequent recognition in cases of this kind, has, in my opinion, been carried far enough. It would be a hard thing to say that where a party is served with a notice to quit by a person having no authority to demand possession from him, or to release him from his liabilities as tenant, a subsequent recognition by the landlord should be sufficient to give validity to such a notice. If such were the law, it would enable a landlord to play fast and loose ; and, as there should be reciprocity in such cases, it ought to follow that the service of a notice to give up the possession, by a person totally unconnected with the tenant, would be a sufficient notice to determine the tenancy, provided the tenant subsequently chose to recognise or adopt it. I am at a loss to understand upon what principle the cases have gone so far upon this doctrine of subsequent recognition. So far as I

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find it established, I feel myself, of course, bound by it ; but I am not for pressing it beyond the limits to which the English decisions have carried it. The case by which I am disposed to abide is that of *Doe v. Walters* (a), which decides that, at all events, the mere bringing of the ejectment is not a sufficient ratification of the authority of the agent. Parke, J., there says, "The notice ought to be such as the tenant could act upon with "security at the time when it was given. What assurance had the tenant "that the landlord would accept possession at the end of the half-year?" and Littledale, J., adds—"The agent ought, at the time when he gave "the notice, to have had authority to determine the estate of the tenant ; "for the notice is valid only by reason of its being the notice of the "landlord. If the landlord, therefore, gave authority to the agent after "the six months mentioned in the notice began to run, the tenant would "not have six months' notice." This case expressly overrules the authority of the *Nisi Prius* decision in *Roe v. Pierce* (b). If, however, we be pressed by the conflicting authority of the Court of Queen's Bench in this country, I can only say that the English decision is the later one, which, so far from having been overruled, has been expressly recognised by a subsequent decision in the Court of Common Pleas in that country (c). In this case there is, in my opinion, no evidence, with the exception of the subsequent bringing of the ejectment, which can be considered as a recognition of the act of the agent ; and such evidence not being sufficient according to the most recent authorities, it follows that there ought either to be a verdict for the defendant or a nonsuit.

Let the cause against the conditional order to set aside the verdict obtained by the defendant in this cause be allowed without costs, said conditional order discharged ; and judgment entered for the defendant.

(a) 10 B. & C. 626.

(b) 2 Camp. 96.

(c) *Doe dem. Rhodes v. Robinson*, 4 Scott, 396.

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*Exch. of Pleas.**Easter Term.**May 26.**June 7.*

Lessee of Sir ROBERT GORE BOOTHE, Bart.

v.

F. M'GOWAN.

A letter of Attorney empowering a person to receive rents and serve notices to quit, requires two separate stamp duties; but *Semble*, that a letter or power of Attorney to receive rents and to distrain, requires but one; the power to distrain being incidental and ancillary to the power to receive the rents.

EJECTMENT on the title. At the trial before Crampton, J., at the last Summer Assizes for the county of Sligo, the defendant admitted tenancy, generally, and the lessor of the plaintiff relied on the service of a notice to quit, which was signed by Mr. G. Dodwell, his agent, pursuant to the authority vested in him by the following letter of attorney:—"Know all men by these presents, that I, Sir Robert Gore Boothe, of Lissadill in the county of Sligo, Baronet, have named, ordained, constituted, nominated and appointed, and by these presents do make, ordain, constitute, and appoint George Dodwell, of Kerinsforth in the county of Sligo, aforesaid, Esq., my true and lawful Attorney or Agent, for me and in my name, and to my use to ask, demand, and receive from the several tenants and occupiers of my estates, houses, lands, tenements and farms, situate, lying and being in the said county of Sligo, in Ireland, all rent and arrears of rent now due and payable, or hereafter to grow due and payable to me from the several tenants and occupiers for or in respect of their several farms, lands and houses, which they rent or hold of or from me, and on receipt of the same good and sufficient receipts and acquittances for me and in my name to give; and in case the said tenants and occupiers of the said farms, lands or houses, or any of them, shall refuse or neglect to pay him, the said George Dodwell, the rent and arrears of rent now due, or hereafter to become due, from them or any of them, to me, I do hereby authorise and empower the said George Dodwell, and all and every such person and persons as he shall appoint to assist him, for that purpose, into and upon the houses, lands, tenements and farms, of the several tenant or tenants so refusing or neglecting to pay to him, his or their respective rent or arrears or rent, to enter and distrain for the same, and the distress and distresses then and there found, to take, lead, drive and impound, and thereof to dispose according to law, for and towards payment and satisfaction of the rent then due and in arrear; and generally to do or cause to be done, all and every other lawful act or acts, thing or things, that may be necessary for or towards recovery or compelling the payment of my said rents and arrears thereof; and more especially I do hereby appoint the said George Dodwell to sign for me and in my behalf all notices to quit possession which it may be necessary to serve on any of my tenants or occupiers of my estate in the said county of Sligo; hereby giving and granting to my said Attorney full power and authority in the premises,

"and declaring that whatsoever he shall lawfully do or cause to be done therein, shall be effectual to all intents and purposes as if done by me in my proper person. In witness whereof, I have hereunto set my name and seal this fifth day of May, in the year of our Lord one thousand eight hundred and thirty-four. "ROBERT GORE BOOTHER."

"Present, &c.

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This letter of Attorney, which was upon a £5 stamp, was offered in evidence on the part of the plaintiff, but was objected to as not having the proper stamp, by the defendant's Counsel, who called for a nonsuit. Verdict for the plaintiff, with leave to the defendant to apply to the Court above to have a nonsuit entered.

Mr. Casserly and Mr. Clooe for the defendant.

Mr. West, Q. C., and Mr. J. H. Blake, Q. C., for the plaintiff.

For the defendant it was contended that as the letter of Attorney contained a power to do three things, it required three separate stamps, viz., a £5 stamp for that part of it which authorised the agent to receive the rents; a 10s. stamp for that part which authorised him to distrain; and a further stamp of 10s. for that part which authorised him to serve notices to quit.*

The COURT, however, seemed to be of opinion that the power to distrain might be considered as incidental and ancillary to the power to receive the rents, and that the utmost, therefore, that could be contended for by the defendant was, that the letter of Attorney required *one* additional stamp duty of 10s. for that part of it which authorised the agent to serve notices to quit. The Court further intimated its opinion that such additional stamp duty was necessary; but it having been asserted on the part of the plaintiff, that according to the invariable usage at the Stamp Office, a duty of £5 had been considered sufficient on an instrument of this description, the Court directed its Officer to make inquiry how the practice really was; and in the mean time ordered the case to stand over.

BRADB, C. B., on this day pronounced the judgment of the Court.

In this case an objection was made to the letter or power of Attorney

June 7.

* The following are the stamp duties in relation to this subject, imposed by the 56 G. 3, c. 56, sched. 1, Ir. :-

"Letter, or power of Attorney of any other kind, not otherwise charged . . . £0 10 0

"Letter of Attorney, empowering any person to receive rents in Ireland,

"except letters of Attorney to receive rents under custodiams or elegits," 5 0 0

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produced on the trial, on the ground of the insufficiency of the stamp. It was contended, that inasmuch as it authorised the doing of distinct things, it required an additional stamp for each matter which it so authorised, and that an additional duty of 10s. was consequently necessary for that part of it which gave the agent authority to serve notices to quit. As it was stated in the course of the argument, that according to the settled usage or practice of the Stamp Office, a £5 stamp was considered sufficient on a document of this description, and as such a practice or usage, had it existed, might have influenced the opinion of the Court to a certain extent (a), we directed our Officer to inquire at the Stamp Office how the fact really was, and he reports to us that the Officers there consider that the letter or power of attorney in this case, requires not only a £5 stamp for that part of it which gives authority to receive the rents, but also an additional stamp duty of 10s. for that part of it which authorises the services of notices to quit. We think, therefore, there is nothing to prevent us from putting that construction on the act of Parliament which we were at first inclined to put, namely, that the additional stamp is requisite in this case.

It is ordered by the Court that the verdict obtained by the lessor of the plaintiff be set aside on payment of the costs of the trial and of this motion to the defendant.

(a) See *Lessee Nagle v. Ahern*, 3 Ir. Law Rep. 41.

Lessee of HARDING v. MACNAMARA.

Upon the trial of an ejectment under the order of a Court of Equity, the question to be tried being, whether an accepted proposal was for the term of 21 or 31 years:—*Held*, that the proposal might be given in evidence, although not stamped.

EJECTMENT on the title, upon a notice to quit.—After the action had been brought, the defendant filed a bill in the Equity side of the Court, stating an accepted proposal for a lease of the lands sought to be recovered in the ejectment, for the term of thirty-one years; and praying specific execution of that agreement, and an injunction against the proceedings at law.

Upon the motion for the injunction, it appeared that the words “thirty-one” in the accepted proposal were written on an erasure; and the landlord insisting that the agreement was for a lease for the term of twenty-one years only, the Court directed the action of ejectment to be proceeded in; the question to be, whether the instrument produced upon the motion (and which was indorsed by the Register) was genuine or not. The action came on to be tried before Mr. Serjeant Greene at the Summer Assizes 1840, for the county of Cork. The defendant produced the

accepted proposal, and offered to read it in evidence ; to which Counsel for the plaintiff objected, inasmuch as it was not stamped. The learned Serjeant was of opinion that the order under which the trial was had precluded the plaintiff from taking this objection, and admitted the document to be read. The Jury found a verdict for the defendant.

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Mr. *Hickson*, Q. C., for the plaintiff, moved for a new trial, on the ground that the proposal was not admissible in evidence without a stamp ; and cited a MSS. case, in which the parties were directed to admit a certain document upon the trial of an issue directed by the Court of Equity Exchequer, yet the Judge before whom it was tried refused to admit the document to be read because it was not stamped, saying that the Court had no power to repeal an Act of Parliament ; and this opinion was upheld by Joy, C. B., and the Court of Exchequer.

Mr. *Collins*, Q. C., and Mr. *J. J. Murphy*, Q. C., *contra*.

This is not the ordinary case of an action at law ; but is, in reality, an issue directed by a Court of Equity to inform its conscience as to a particular matter collateral to the defence of the action at law. Whether the proposal were for a lease for thirty-one years or twenty-one years, was wholly immaterial so far as the ejectment was concerned ; in either case there must have been a verdict for the plaintiff ; but it was material to the defence in the Equity suit. A party may, by his conduct, preclude himself from objecting that the document upon which the action is founded, has not been stamped ; *Israel v. Benjamin* (a) ; as by not making the objection in the first instance ; *Fops v. Wagner* (b) ; *Field v. Woods* (c). So where a party filed a bill for the specific performance of an agreement, alleged to be contained in a series of letters ; and the defendant, by his answer, admitted the letters, but denied that they contained any agreement, it was held that the defendant could not object that the letters were not stamped. The plaintiff ought to have made this objection upon the motion for the injunction ; and the Court having obtained the information they required, as to the particular fact referred by them to the Jury, will not send the case to a second trial, upon an objection wholly irrelevant to the question to be tried ; especially as the Revenue may be protected by compelling the plaintiff in the Equity suit to have this proposal properly stamped.

Mr. *J. D. Fitzgerald* in reply.—Neither the Court nor the Jury can look at an instrument as evidence of title unless it be stamped : *Sweeting v. Halse* (d) ; *Jardine v. Payne* (e) ; here it was absolutely necessary

(a) 3 Camp. 40.

(b) 7 A. & E. 116, n.

(c) 7 A. & E. 114.

(d) 9 B. & C. 365.

(e) 1 B. & Ad. 663.

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that the instrument should have been produced at the trial. This document, although marked by the Registrar for the purpose of identification, was not read to the Court upon the motion for the injunction; and, therefore, the landlord has not lapsed his time for making this objection.

BRADY, C. B.

If this were the case of an ordinary trial at *Nisi Prius*, there might be a difference; but it is not so; for substantially this is rather an issue from the Equity side of the Court than an action pending at the Law side. It is true that it is an action of ejectment; but it has been moulded, and the questions to be tried in it have been settled by an order in the injunction suit. That suit still remains to be heard; and as the entire matter is attached to the Equity side of the Court, we can deal with it more properly there than here. We are of opinion that the whole matter must be left to be decided in the Equity cause. Therefore,—

No rule on the present motion, but without prejudice to any order that may be made in the Equity cause touching said trial, and the verdict had thereat, defendants undertaking to have the documents read on said trial properly stamped, and also to bring on again the motion for an injunction in said Equity cause in the Sittings after this present Term, and in default of defendant's so doing, that then the plaintiff shall be at liberty to renew this motion to set aside the verdict in the next Michaelmas Term.*

* See *Haigh v. Brooks*, 10 A. & E. 309.

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THE HONORABLE THE IRISH SOCIETY OF LONDON

v.

THE LORD BISHOP OF DERRY AND RAPHOE

and another.

(The Court of Exchequer Chamber.)

Easter Term.
April 28.

THIS was an action of *quare impedit*, brought by the Irish Society of London against the Bishop of Derry, and the Reverend Thomas Lindsay, to recover the advowson of the living of Camus, situate in the diocese of Derry, and county of Londonderry. The declaration contained eight counts, alleging *seizin* in fee of the advowson in the Crown in 1613—a grant of the same to the Society by charter on the 29th of

In an action of *quare impedit* for the recovery of the living of Camus, in which the Bishop was the defendant, the principal issues being as to the *seizin* of

King *James the First*, and *seizin* and possession of the plaintiffs, the plaintiffs gave in evidence a recovery of the said living in *quare impedit* by the Earl of Ulster against the Bishop in 1299, and vested the same by proof of pedigree in King *James the First*. They then gave in evidence a Royal Commission and Inquisition of the 30th of August 1609, finding that all the advowsons in the county of Coleraine, of which Camus was one, did of right belong to the King in right of the Crown. They next gave in evidence articles of agreement, dated in the following January, between the Crown and the Mayor and Commonalty of London, whereby it was stipulated, that all the said advowsons in the county of Coleraine should be vested in the city of London; and a patent by the King, in March 1613, incorporating the Irish Society (the plaintiffs), and granting to them, among others, the advowson of the church of Camus by name. They also gave in evidence a presentation by the Crown, on lapse, in 1619; and read entries from the First Fruits books, as secondary evidence of subsequent *admissions* of Clerks on presentations in 1634 and 1672.

To meet this case, the defendants gave in evidence a surrender of the 1st of August 1610 by G. M., Bishop of Derry, of all the possessions of the See of Derry to the Crown. It was not confirmed by the Dean and Chapter, nor enrolled in Ireland. Also a patent of the 3rd of August 1610, not enrolled in Ireland, by which the King (*James the First*) granted certain lands to the Bishop, and in which, after reciting that the advowsons in the county of Coleraine were the ancient possessions of the See of Derry, it was stated that a certain agreement had been entered into between the Bishop and the Society respecting them. Also the King's letters nominating the two subsequent Bishops of Derry, bearing date respectively the 11th of August 1610, and the 21st of December 1611, reciting and enjoining the aforesaid agreement between the Crown and the Society.

Held—That, independently of distinct grounds of objection to either documents, the said surrender and patent were respectively legally admissible in evidence, on the part of the defendant, for the specified purpose of shewing an admission, on the part of *James the First*, that the advowson of the said church of Camus anciently belonged and appertained to the Bishoprick of Derry—being made so by the evidence given on the part of the plaintiffs, especially that of the Commission and Inquisition.

Held—That the two King's letters were admissible in evidence, on the same grounds.

Held—That the said patent, being plainly founded on the surrender, an acceptance of the surrender by the King might reasonably be presumed.

Held—That the 35 G. 3, c. 39, cured the objection of the non-enrolment of the patent in Ireland.

Held—That, even if the surrender were void, the patent was validated against the Crown by the 10 Car. 1, sess. 3, c. 6.

Held—That the said patent was not void on the ground of the King having been deceived in his grant.

Held—That collations by the Bishop's predecessors were admissible as evidence for him on the issues.

Held—That the First Fruits books, the Primates' Triennial Visitation books, and the Bishops' returns to the First Fruits writs, were respectively admissible, on the parts of the defendants, as secondary evidence of lost collations by the Bishops.

Semble—Continued possession by repeated collations may be evidence of original title.

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March in the same year, and presentations by them, or by lapse, of Alexander Spicer in 1619—of Thomas Vesey in 1634—and of Jonathan Edwards in 1672. To these counts (the defendant Lindsay having allowed judgment to go by default) the defendant pleaded several special pleas to the material allegations; and to these the plaintiffs replied, taking issues on the *seizin* in fee of the Crown in 1613—on the *seizin* of the Society in 1619, 1634, and 1672—on the presentation by the Society of Alexander Spicer in 1619—on the presentation of the same by the Crown on lapse—on the presentation of Thomas Vesey by the Society in 1634—on the collation to the same by the Bishop on lapse—on the presentation to the same by the Crown on lapse—on the presentation of Jonathan Edwards by the Society in 1672—and on the present right of the plaintiffs to present. The case was tried at Bar in the Court of Common Pleas on the 9th of November 1840, and the two following days, before a Special Jury of the county of Londonderry, when exceptions were taken by the Counsel for the plaintiffs to the admissibility of the evidence which was given on the part of the defendant.

The plaintiffs' Counsel, in support of their case, gave in evidence—

1st. Certain letters patent, bearing date the 14th of February, in the thirty-eighth year of the reign of *Henry the Third* (1254), by which the King granted unto his son Prince Edward, all Ireland, with the exception of the cities of Dublin and Limerick, and the town of Athlone; saving all crosses, and the custody of vacant churches.

2nd. Certain other letters patent, bearing date the 20th of July in the same year (1254), granting to the same Prince Edward the cities of Dublin and Limerick, and the town and castle of Athlone, reserving all the crosses, and custody of cathedral churches and abbeys of Ireland.

3rd. A grant from Prince Edward to Lord Walter De Burgo, of all the land of Ulster, to hold to him and his heirs as freely and quietly as Hugh de Lacy* held the same, excepting the four pleas of the Crown, and the advowsons of cathedral churches.

The plaintiff then proved that Lord Walter De Burgo, having died, was succeeded in his estates and property by his son Richard De Burgo, and that the said Richard De Burgo, on the death of his father, became Earl of Ulster in Ireland.

4th. The plaintiffs next gave in evidence a record of a judgment in *quare impedit* in the 27th year of King *Edward the First* (1299), in

* This Hugh de Lacy held the province of Ulster as Count Palatine; and it was by virtue of this grant that Walter De Burgo became Earl of Ulster, and had regal jurisdiction within his palatinate.—*Sir John Davies' Rep.* 172. Two other palatinates were created by King Henry the Second, in Ireland, at the same time as that of Ulster, viz. Leinster, granted to Strongbow; and Meath, granted to Hugh De Lacy the elder.

which Richard De Burgo, Earl of Ulster, was plaintiff, and Galfridus Bishop of Derry was defendant. The pleadings were set out in the record, and stated the summons to answer—a plea of misnomer by the Bishop,* which was found against him—and judgment for the plaintiff on the record.

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5th. Another record of a recovery in a *quare impedit*, in the same year, of the living of Camus, similar in every respect to the foregoing, and immediately following the enrolment thereof on the same plea roll; and in which the Jury found as in the first.

6th. A writ of *levari facias*, directed to the Sheriff of the county of Meath in the same year (1299), commanding him to levy the amount of forty marks of the goods of the Bishop of Derry, for the damages assessed in the preceding recoveries of Drumachose and Camus; and also the Sheriff's return.

7th. The Counsel for the plaintiff next gave in evidence, and proved by the contents of several public writs, returns, and records, that the said Lord Richard De Burgo died, leaving a son and heir, John De Burgo Earl of Ulster, whose son and heir was William De Burgo Earl of Ulster, who died, leaving Elizabeth his daughter and heiress. This Elizabeth, it was proved, married Lionel Duke of Clarence, who in her right became Earl of Ulster. They died, leaving a daughter and heiress, Philippa, who married Edmond De Mortimer Earl of Marche, who in her right became Earl of Ulster. Their son and heir was Roger De Mortimer, who became, on their deaths, Earl of Ulster. This Roger De Mortimer died, leaving a son and heir Edmond De Mortimer, who thereupon became Earl of Ulster, and was succeeded, on his death, by Richard Duke of York, son and heir of Anne, sister and heir to the said Edmond; and this Richard, Duke of York, Earl of Ulster, died, leaving a son and heir, *Edward the Fourth*, King of England, and from him the Crown of England descended to *Henry the Seventh*.

8th. The plaintiffs' Counsel next read, and relied on, the statute 10 *Hen. 7*, c. 15, which was entitled "An Act touching the keeping of the records of the Earldoms of Marche, Connaught, Trim, and Ulster;" and was made in consequence of the felonious destruction of the rolls, records, and inquisitions of the Crown, which were deposited in the Castle of Trim. It enacted, in the third section, "That the King "might present to all advowsons of churches or free chapels, appending

* The plea of the Bishop was—" *Predictus Episcopus per se dixit quod non tenebatur eidem comitatui (Ricardo De Burgo) inde ad hoc breve respondere, quia dixit quod non vocabatur Galfridus sed Gofridus, et de hoc posuit se super patriam.*" The finding of the Jury was as follows:—" *Juratores dicunt supra sacram scripturam, quod predictus Episcopus vocatur Galfridus, et eo nomine cognoscitur inter homines Anglicanos, et eodem nomine baptizabatur; sed Hibernici nesciunt vocare ipsum in partibus suis nisi Gofridus, secundum modum Hibernicorum. Ideo consideratum,*" &c.

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“to any of the honors, manors, or lordships in the Earldoms of Marche, Connaught, Trim, or Ulster, or to advowsons in gross, any presentation, confirmation, or ratification to the patron notwithstanding, whereof any manner of lawful title or discharge of the said Sovereign Lord’s interest could not be shewed.”

It was next proved, that the Crown of England and Ireland descended from King *Henry the Seventh* to King *James the First*.

9th. A royal commission, bearing date the 21st of July 1609, directed to certain persons in Ireland named therein, including George Montgomery Bishop of Derry, and enrolled in Ireland. It recited the escheat of lands in several counties (including the county of Coleraine) in the province of Ulster, and empowered the Commissioners to inquire what castles, manors, tenements, advowsons, &c., in the said counties had escheated, or ought to escheat, and come to the hands and possession of any of the Kings or Queens of England, by any means whatsoever; and to make an exact survey thereof. It also empowered them to decide on all controversies concerning the said lands and hereditaments.

10th. Articles of instruction annexed to the said commission, also enrolled in Ireland, by which the said Commissioners were directed to assign glebe lands to the Incumbent of each parish; to make final decrees; compound titles between party and party concerning the said lands; and to have titles of record thereto perfected and preserved.

11th. An inquisition held at Limavady on the 30th of August 1609, under the authority of the Crown, and enrolled in Ireland; it recited the aforesaid commission, set out the names of the jurors, and then proceeded to state,—that the jurors had found on oath, that the late Bishop of Derry, before and until the Statute of O’Neill’s attainder, in the eleventh year of the reign of *Elizabeth*, was seized in right of his bishoprick, of several yearly rents, customs and refections, issuing out of certain specified Herenagh* lands, including the Herenagh lands of Camus. It further

* Herenachs were a class of Ecclesiastics, settled in the north of Ireland from a very remote period, and prior to the establishment of Bishops in the kingdom. They were not ordained Priests, but a species of lay Archdeacons, to whom were entrusted the care and management of charities and hospitals. The Corbes, or Chorepiscopi (as they are styled by Usher), appear to have been ordained Clergy, whose offices were somewhat higher in dignity than the Herenachs. Extensive tracts of land, which were called Herenagh or Termon lands, appear to have been held by these persons, or by their septs, according to an Irish tenure, the custom of Tanistry, the principle feature of which was, that the most worthy of the family of the deceased possessor should inherit, to the exclusion of the heir-at-law. This tenure was declared by a judicial decision in the reign of King *James the First*, to be void, and abolished by the establishment of the Common Law of England in this country; and by force of that decision, the lands became from thenceforth vested in the Crown, and were subsequently annexed to the several Sees within which they were situate. The fact of these Herenagh lands having been hereditary, is a proof that the celibacy of the Clergy was not an ordinance of the ancient Irish Church.

found, on the jurors' oaths, that the right of presentation and advowson of churches within the county of Coleraine, did of right belong and appertain to the King's Majesty in right of his Imperial Crown; but that the Bishop might, and did, until the 11th of *Elizabeth*, place a clerk in any parsonage or vicarage being void, until the King presented or bestowed the advowson on the Bishop, or some other person. This inquisition was signed by George Montgomery, Bishop of Derry, among others of the Commissioners.

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12th. Certain articles of agreement, bearing date the 28th of January* 1609, enrolled in Ireland, between the Crown and the Mayor and Commonalty of the city of London, concerning the plantation of Ulster, the principal part of which had lately escheated to the Crown by the attainder of sundry rebels therein. By the first article, it was agreed, that the city of London should expend £2000 on the intended plantation; and by the ninth article, that they should have the patronage of all the churches, as well within the city of Derry and town of Coleraine, as in all the lands to be undertaken by them.

13th. A ratification by the Privy Council of the said articles, dated the 29th of March 1613, enrolled in Ireland.

14th. Letters patent, bearing date the 22nd of March 1613, enrolled in Ireland (commonly called the plaintiffs' charter), which recites its object and purposes, creates the county of Londonderry, and incorporates the Irish Society, under the name of "The Governor and Assistants, London, of the New Plantation of Ulster, within the realm of Ireland," and then goes on to grant to the said Society several denominations of land therein specified, and also all the advowsons and rights of patronage of all the churches, vicarages, and chapels, of and in the city of Londonderry, and of and in the town of Coleraine; and also all the advowsons and rights of patronage of twelve rectories and churches, therein particularly mentioned, including that of Camus;—and specially excepting three by name, one of which was Drumachose. The said grant also contained a covenant on the part of the Society, to convey to the several Incumbents sufficient glebe lands, proportioned to the extent of their respective parishes.

15th. The Counsel for plaintiffs next, as evidence of possession, proved the presentation of Alexander Spicer to the said living in 1619, by letters patent of King *James the First*, on lapse; and also the institution of the said Alexander Spicer on that presentation.

16th. They next produced, as a witness, the proper Officer for the custody

* Previous to 1752, the year commenced on the 25th of March, so that the month of January was subsequent to the month of August in each year, and consequently these articles were entered into five months after the date of the inquisition. The same observations apply to the collations of Thomas Brevider and Thomas Daniel in September and January 1716, given in evidence by the defendant.

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of the First Fruits records, who proved a search for the original First Fruits writ and Bishop's return, as to the admission of Thomas Vesey to the rectory of Camus in 1634; and that the same were not forthcoming; and then produced a book of the First Fruits office, remaining of record there, from which he read the following entry, made from the certificate of John Bishop of Derry, bearing date the 6th of April 1635:—"*Composuit Thomas Vesey admissus fuit 1634, ad Rectoria de Camus super Morne in Comitatu Londonderry.*" It was then proved, that the words "*super Morne*" were a mistake, and should have been "*super,*" or "*juxta Bann.*"

17th. Plaintiffs' Counsel gave similar evidence respecting an unsuccessful search for the original writ and return as to the institution and induction of Jonathan Edwards to the rectory of Camus in 1672; and then the following entry, made from the certificate of Robert Bishop of Derry, bearing date the 28th of October 1672, was read from another of the First Fruits books:—"*Composuit Jonathan Edwards, institutus et inductus primo Maii 1672, ad Rectoria de Camus juxta Bann, Comitatu Londonderry.*"

The Counsel for the plaintiffs then produced one of the Registrars of the diocese of Derry, who proved that the earliest records now to be found in the registry of that see were of the year 1693; and then having proved that the parish of Camus next adjoined the parish of Drumachose, and that the rectory and glebe of Camus were of the value of £850 per annum, deducting the late statutable allowance,—they closed the case upon the part of the plaintiffs.

The Counsel for the defendant, the Bishop of Derry, in order to support his case, produced in evidence:—

1st. An order on consent to let in copies of certain specified documents, to be read at the trial as if they were the originals.

2nd. A certain document, dated the 1st of August 1610, purporting to be a surrender by George Montgomery, Bishop of Derry, to King *James the First*, of all that the rectory and parsonage of Derry; and also all parsonages, vicarages, impropriations, advowsons, patronages, nominations and presentations of churches, chapels, or parishes, within the diocese of Derry and county of Coleraine, whereto he, the said George, hath, had, or ought to have any right of presentation, to be disposed of at his Highness' good will and pleasure. This surrender was enrolled in England, but not in Ireland—had not been confirmed by the Dean and Chapter of Derry—and was offered in evidence for the alleged purpose of shewing an admission on the part of King *James the First*, that the advowson of Camus did anciently belong to the bishoprick of Derry. The admissibility of this document in evidence for the *aforesaid purpose*, was the subject of the first exception.

3rd. A grant by the King to the said Bishop Montgomery, bearing date

the 3rd of August 1610, which was enrolled in England, but not in Ireland. This grant conveys to the said Bishop and his successors, the Herenagh lands in various counties, and the advowsons and rights of all the rectories, churches, vicarages, and chapels, whatsoever, to the premises above by those presents before granted, and to the same bishoprick of right belonging and appertaining, as and to which the Bishops of Derry heretofore were accustomed to present or collate,—as by the survey thereof lately taken in our said kingdom of Ireland, and under our great seal for Ireland lately exemplified, which exemplification is dated at Dublin the 26th of January in the seventh year of our reign of England, more plainly is manifest and appears—except the advowsons in these presents expressly excepted; and excepting nine out of the number of the fifteen advowsons within the county of Coleraine, which, by mutual consent of the Bishop and Citizens of London, are to be transferred from the Bishop of Derry and his successors to the said Citizens of London. And in the said grant, after a recital, that—“Whereas we are informed that there are in the county of Coleraine, and within the said diocese of Derry, fifteen advowsons of churches, rectories, and other ecclesiastical benefices, anciently belonging and appertaining to the said bishopric of Derry;” and also of the agreement that the Bishop was to have six, and the Society nine, of the said advowsons—there is a provision for the election and appropriation of the said advowsons by, and to, their respective patrons. This grant was offered and read in evidence by the Counsel for the defendant, *for the same purpose* as the preceding surrender, and its admissibility *for that purpose* was the subject of the second exception.

4th. The King's letter of the 11th of August 1610, enrolled in the High Court of Chancery in Ireland, directed to the Lord Deputy, nominating Brutus Babington to the bishoprick of Derry, void by the resignation of Bishop Montgomery; and directing that the said Brutus Babington, and the Dean and Clergy of the diocese of Derry, should, after his consecration and ousterlemain sued, execute and perform the covenants and directions comprised in the letters patent of George Montgomery, on the part of the Bishop of Derry or his successors, to be performed. The admissibility of this document was the subject of the third exception.

5th. Another King's letter similar to the preceding, dated the 21st of December 1611, in favour of Christopher Hampton, appointed to the bishoprick of Derry on the death of the said Brutus Babington, and reciting and repeating the injunction contained in the foregoing in favour of Brutus Babington, respecting the covenants in the letters patent of Bishop Montgomery. The admissibility of this document was the subject of the fourth exception.

6th. Counsel for the defendant next proved an unavailing search for the survey of the 26th of January, in the seventh year of the reign of King *James*

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the First, and for the exemplification thereof in the several offices where the same ought to be ; but what was conjectured to be an abstract or digest of it was produced. They then proved an unavailing search among the records in the First Fruits office for original writs and returns thereto, relative to one John Freeman, and to one Walter Forrest, respectively ; and proceeded to read from one of the First Fruits books which had been produced by the plaintiffs' Counsel (and from which they had read the aforesaid entry as to Thomas Vesey) the following entry :—" *Composuit Johannes Freeman, collatus et admissus fuit septimo die Octobri 1629, Rectoria de Camus juxta Bann in Londonderry.*" The admissibility of this entry in evidence was the subject of the fifth exception.

7th. The following entry from another of the First Fruits books was next read :—" *Per certificationem Ezekiel Derrenniensis Episcopi, datam 26 die April 1686—Composuit Gualterus Forrest clericus, collatus fuit 25 die Martii 1686, ad et in Rectoria de Camus juxta Bann.*" This entry was the subject of the sixth exception.

8th. Counsel for the defendant next examined the Deputy Registrar of the archdiocese of Armagh, who had the custody of the books and records of that See, and who read from the original Triennial Visitation book of the said archdiocese of 1664, produced by him, the following entry :—" *Camus cum M^cCosquin—Brian Roche, in artibus Magister Rector comparuit, &c. Idem exhibuit collationem et institutionem ad Rectoria de Camus M^cCosquin, datum 17 Junii 1661, cum mandato ad inducendum eodem die.*" This entry was the subject of the seventh exception.

9th. Counsel for the defendant next produced, from the custody of the Officer who had the custody of the writs issued from the Court of Exchequer in Ireland, and returned into the office of the First Fruits, and also of the returns made by the several Bishops to the said writs, and read a First Fruits writ, bearing date the 12th of February, in the third year of the reign of King *George the First* (1717), directed to George, Bishop of Derry, and requiring him to certify the names, nature, and quality of the several livings, &c., which had become vacant from the 10th of May 1714, unto the return of the writ ; and also the clerk admitted, instituted, collated, or inducted thereto respectively, and by what names and surnames they were so admitted, instituted, collated, or inducted, together with the day and year of the institution or collation of each of them ; and in what county or counties the said livings were respectively situated, without any omission whatsoever. They then produced, from the same office, and read the Bishop's certificate, or return thereto, dated the 29th of May 1717, in which it was certified, among other things, that the rectory of *Camus juxta Bann* in the county of Londonderry, became vacant by the natural death of Walter Forrest, the last Incumbent ; and that Thomas Breviter was collated to the same on

the 4th of September 1716; and, also, that the same rectory of Camus *juxta* Bann having become vacant by the resignation of Thomas Breiviter, Thomas Daniel *was collated* thereto in the month of January* in the same year (1716). Other vacant livings were certified in the same return, in which the successors were respectively stated to have been *instituted*. The eighth exception was to the admissibility of this certificate as evidence against the plaintiffs; or supposing, but not admitting, that whatever related therein to Camus was admissible, yet that the other parts, not relating thereto, ought not to have been admitted in evidence, and read against the plaintiffs.

10th. Another First Fruits writ, bearing date the 5th of May 1788, was produced from the same custody; and the return thereto, bearing date the 19th of May in the same year, to which the Bishop affixes a schedule of the several collations and institutions, and among them the following;—"The Rev. Gardiner Young, A. B., *was collated* to the rectory of Moycosquin in the county of Londonderry, the 5th day of May 1787." This return was the subject of the ninth exception, which was similar in terms to the eighth.

11th. Another First Fruits writ, bearing date the 12th of February 1798, similar in every respect to the two preceding ones; and the Bishops return thereto, from the schedule to which the following extract was read:—"The Rev. Harrison Balfour was collated to the rectory of Moycosquin in the county of Derry, the 2nd of June 1797, in the room of the Rev. Gardiner Young, who held the same from the 5th of May 1787, and vacated by resignation on or about the 2nd day of June aforesaid." This return was the subject of the tenth exception, which was similar in terms to the two preceding exceptions.

12th. Another similar First Fruits writ of the 11th of July 1821, and the return of the Bishop, in the schedule to which it was certified, that "The Rev. Thomas Richardson was collated to the rectory of Camus *juxta* Bann in the county of Londonderry, on the 23rd of June 1821, by the Bishop of Derry, in the room of the Rev. Harrison Balfour, who held the same for twenty-four years, and vacated it by death on or about the 2nd of June 1821." This return was the subject of the eleventh exception, which was the same in terms as the eighth, ninth, and tenth.

13th. One of the Deputy Registrars of the diocese of Derry was next produced, who deposed as to a search among the records of that See in his custody, for collations of the rectory of Camus by the Bishops of Derry, and that he had found only three official collations, viz. that of Thomas Richardson, bearing date the 23rd of June 1821, and two others lodged since the commencement of this suit. The collation of

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the said Thomas Richardson by the Bishop, purporting to be *pleno jure*, was then read. The admissibility of this document in evidence was the subject of the twelfth and last exception.

The Counsel for the defendant then closed his case, and the Chief Justice, with the consent and approbation of the other justices, charged the Jury, leaving all the evidence on both sides to their consideration, and directing them, that if they should be of opinion that the title to the advowson of Camus was proved to be in the plaintiffs, and that they had shewn any exercise of the possessory right, they were to find accordingly for the plaintiffs; but if, on the contrary, they should be of opinion that the title to the said advowson was not proved to be in the plaintiffs, or that they had not shown any exercise of any possessory right thereof, they should find a verdict for the defendant, the said Bishop of Derry. The Jury found for the defendant upon all the issues knit upon the record of the pleadings in the cause; and a bill of exceptions as to the admissibility and reception of the defendant's evidence as aforesaid having been taken, the same now came on for argument before the Court of Exchequer Chamber.

Mr. *William Boyd* and Mr. *Holmes*, with whom was Mr. *Adam Alexander*, in support of the exceptions.

To establish the plaintiff's case, we shewed original title in the Crown, by the production of the recovery of the advowson in dispute, by Richard De Burgo in 1299; and which, though a judgment on a plea of misnomer was, in an action of *quare impedit*, a judgment *quod recuperet*, and not of *respondent ouster*; 1 *Tidd. P.* 601 (9th ed.); *Crosse v. Bilson* (a); *Eichorn v. Le Maitre* (b); 2 *Wms. Saund.* 210, n. 3. This title we vested in the Crown by proof of the pedigree of Richard De Burgo, and by the operation of the 10 *Hen.* 7, c. 15; and being thus vested in the Crown, it was bound by the articles of 1609, which were subsequently carried into effect by the letters patent of 1613, having been, in the meantime, confirmed by the finding of the Inquisition of Limavady. We then gave evidence of possession by the presentation by the Crown on lapse of Alexander Spicer, by letters patent in 1619, which was an exercise of possession on behalf of those who have the right to present; *Mallory Qu. Temp.* 26; and also admissions of Thomas Vesey and Jonathan Edwards. To meet this case, and entitle him to a verdict, it was incumbent on the Bishop to have given some evidence of original title, inasmuch as at common law Bishops, *qua* Bishops, have not any independent right to advowsons, having nothing but the spiritual care of the diocese. In that respect, their rights are derived from endowment, in the same manner as lay patrons, and ought to be

(a) 2 *Ld. Raymd.* 1022.

(b) 2 *Wils.* 367.

proved by a similar process; *Co. Litt.* 119, b.; *Britton*, c. 92; *Mirehouse on Advowsons*, 6; *Mirehouse v. Rennell* (a). Now, keeping in mind that whatever has been vested in the Crown by record, cannot be got out of it except by matter of record, we shall next consider the admissibility of the documents which they have produced in evidence, and to which we have excepted.

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First Exception.—The surrender, to the reception of which we objected, was put in evidence to prove an admission on the part of the Crown, that Camus was part of the ancient possessions of the bishoprick of Derry. Independent of the fact, that this instrument does not contain one word of evidence of what it pretends to prove—the Bishop only giving up what advowsons he had a right to present to; not all in the diocese or in the county of Coleraine—the first step that should have been taken to make it evidence against any person, was to shew that he was a party to it; but it is a deed poll and the Crown is no party to it. To operate as a surrender, there must be an acceptance; for, in point of law, a surrender is founded on agreement; *Perkins*, 607; and when a surrender is pleaded, the agreement to the surrender must be averred; *Dyer*, 109; *Rast. Ents.* 176, 177; *Peto v. Pemberton* (b). This very point was decided in *Leach v. Thompson* (c); and although the judgment was afterwards reversed in the House of Lords, yet the reversal was against the opinion of all the Judges except Ventria, J. and Atkins, C. B. No agreement of the Crown appearing on the instrument, it cannot be held that it did agree. But, farther, there could have been no acceptance by the Crown, inasmuch as the surrender was void for want of confirmation by the Dean and Chapter; *Co. Litt.* 103; and that such a confirmation was absolutely necessary appears, moreover, from the 10 *Car.* 1, *Sess.* 3, c. 5, which was passed for the express purpose of confirming leases made by the Bishops of Ulster, but which had not been confirmed by the respective Deans and Chapters; and, therefore, without such a confirmation, no estate having passed to the Crown, there could have been no acceptance. There is also another fatal objection to it, in its not having been enrolled in Ireland. The King can only take by matter of record—2 *Bl. Com.* 346—which is either by record judicial, as attainder—by record ministerial, as office—or by conveyance of record by deed enrolled; *Case of the Commonalty of Sadlers* (d); *Com. Dig. Prerog. D.* There is no record until enrolment; *Sir Edward Dymock's case* (e); and no deed can be enrolled unless duly and lawfully acknowledged in a Court of Record; *Co. Litt.* 225; 2 *Lill. Pr. Reg.* 67. Nor have the Courts in Westminster any jurisdiction to enrol a deed

(a) 8 Bing. 490.

(b) Cro. Car. 101.

(c) 1 Show. 274.

(d) 4 Rep. 54.

(e) Lane, 60.

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touching lands in Ireland, being an independent kingdom; *Peacocke v. Bell* (a).—[TORRENS, J. The instrument was not produced for the purpose of proving title in the Crown, but only an admission of title by the Crown.]—The whole instrument must be taken together; and, therefore, if inoperative as a surrender, the Crown getting nothing, how could it be effectual as binding it by an admission?

Second Exception.—The patent bears date two days subsequent to the surrender; and it will, no doubt, be said, that they formed one and the same transaction, and, therefore, shew a recognition by the Crown that George Montgomery had, as Bishop, something to surrender. There is, however, no recital in the patent of the surrender—nothing to connect them. But, even suppose that the patent had been founded on the surrender, yet if the King grants on a void surrender, the grant founded on it falls to the ground; *Barwick's case* (b); *Alton Woods* (c); *Case of Tanistry* (d). This grant is also void, on the principle that no grant of the King is good if he has been misinformed or deceived in his grant; *Shep. Ab. Prerog.* 96. Now, it was manifest from the recitals that there had been misinformation, because they state that fifteen advowsons belonged to the ancient See of Derry, whereas the recovery of 1299 had vested one of them in the Crown. There was also fraud in the non-recital of the articles of 1609, by which the Crown had bound itself, and which were afterwards carried out in the patent of 1613. In support of this position, Best, C. J., in the case of *Alcock v. Cook* (e), makes the following observations:—"This brings us to the question, "whether, as the King had granted a lease of this property, and had not recited that lease in the grant of the fee in perpetuity, the latter grant "was not, by the common law of England, altogether void? We are of "opinion that it was altogether void." The parties had the means of knowing the articles of agreement which were enrolled, and they ought to have informed the Crown, and to have recited them; and not having done so, the patent is wholly inoperative as a conveyance, and consequently as evidence.

But, supposing that the patent were free from all objections, and that the recitals were relied on as evidence in this case, they can only be received against third parties, on one of two grounds—either as declarations against the interest of the party making them, or as admissions made by a privy in estate. As to declarations against interest—in order to their reception, two ingredients are necessary:—first, peculiar knowledge of the facts; and second, that they are against the interest of the party making them. This is the rule, as laid down by Littledale, J., in *Middleton v. Melton* (f). Now, the presumption of peculiar knowledge cannot be

(a) 1 Saund. 74.

(c) 1 Rep. 43.

(e) 5 Bing. 348.

(b) 5 Rep. 93.

(d) Sir John Davis's Rep. 109.

(f) 10 B. & C. 326.

entertained in the case of the Crown, who cannot, like private individuals, be supposed to be cognizant of their own title, every thing being on information as regards them. Nor can the admission be said to be against the interest of the Crown, inasmuch as it is denied by the plaintiffs themselves that the Crown had any interest in the matter; and we say, that whatever interest the Crown had was parted with by the articles of 1609, after which it could do no act in derogation of the title they had made. On examination of all the cases, it will be seen that the party who made the declaration relied on, had some interest in the subject-matter at the time of making it; *Peaceable v. Watson* (a); *Holloway v. Raikes*, cited by Buller, J., in *Davies v. Pierce* (b); *Doe v. Petit* (c); *Crease v. Barrett* (d); *Walker v. Bradstock* (e); *Carne v. Nicholl* (f). These were all cases in which the party making the declaration was in possession at the time of making it; and when the interest had been previously parted with, it was held that the declarations were inadmissible in evidence; *Doe v. Webber* (g); *Woolway v. Roe* (h); *Gully v. Bishop of Exeter* (i); *Deady v. Harrison* (k).—[PENNEFATHER, B. That argument is founded on the assumption, that the articles of 1609 had taken the legal interest out of the Crown.]—It is indifferent whether the party parts with his interest by a legal or by an equitable conveyance. A Court of Equity will consider that to be done which ought to be done; and the question is not, whether the estate, but whether the interest, is out of him. But to return to the patent, I would ask, ought we to be bound by the recitals in it, in one of which it is recited, that fifteen^aadwosons in the county of Coleraine anciently belonged and appertained to the See of Derry; and that a certain agreement, of which there is not a tittle of evidence, had been entered into respecting them?—and yet such would be the effect of admitting this patent in evidence.

Third and Fourth Exceptions.—We object to the admissibility of the King's letters, appointing Brutus Babington and Christopher Hampton to the bishoprick. Of themselves they could be no evidence, but it was sought to introduce them as such on account of some reference therein to the letters patent; and they are, therefore, liable to all the objections which have been made to that instrument. But, besides that, they consist, at the most, of mere hearsay evidence, declaring that George Montgomery did enter into certain covenants with a third party, the legal proof of which was attempted to be supplied by the fact of the King having stated it to

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(a) 4 Taunt. 16.

(c) 5 B. & A. 224.

(e) 1 Esp. 458.

(g) 1 Ad. & El. 740.

(i) 5 Bing. 17.

(b) 2 T. R. 55.

(d) 1 C. M. & R. 931.

(f) 1 Bing. N. C. 430.

(h) 1 Ad. & El. 114.

(k) 1 Stark. N. P. C. 60.

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be so. Strip, however, of their royal pomp, they are mere letters from one party to another, viz., from the King to the Lord Deputy of Ireland, and, as such, wholly inadmissible as evidence at the trial.

Fifth and Sixth Exceptions.—The First Fruits books are the record of the first year's profits of each living, which was formerly an ecclesiastical tax, but was afterwards transferred to the Crown by the 28 *Hen.* 8, c. 8 and c. 14, and 2 *Eliz.* c. 3. The returns entered in those books are made by the Bishop, and the word "*admissus*," designating a presentation by a patron, and the word "*collatus*," by the Bishops, these returns made by the Bishops in the event of the original presentation not being forthcoming, would be obviously the best evidence for the patron against the Bishop; while, on the other hand, it is equally clear, that they could not be considered as any evidence whatever in his favour. We might, therefore, resort to those books as evidence, although the Bishop could not. If these returns were admissible, being declarations of a party not upon oath, they must be received, either as declarations against interest, or as declarations of duty; 1 *Phil. on Ev.* 307; *Barker v. King* (a); *Marks v. Lahee* (b); *Higham v. Ridgway* (c). But these returns are not against, on the contrary, they are directly for, the Bishop's interest; and to admit them would be to allow him to make evidence for himself; *Short v. Lee* (d). Therefore, the returns being inadmissible, the books, which are mere digests of them, are also inadmissible; nor, although public acts by a public officer, are they to be received as such, when sought to be used by a Jury; *Merrick v. Wackley* (e); *Rex v. Debenham* (f); 1 *Phil. on Ev.* 344. The cases of entries by Rectors and Vicars will be relied on, but they are admitted to be excepted cases from the general rule, and lamented by the Judges. We resorted to those entries in the First Fruits Books, to prove presentations by the patron, one of the entries being "*admissus*," and the other "*institutus*;" and they contend, that we, to support our case, having read some of the entries, they had a right to read all the entries in the same book. But a party who reads an entry out of a book does not thereby make the whole evidence for his opponent, unless a part of the same entry had been read by them—*Catt v. Howard* (g); *Adey v. Bridges* (h); *Sturge v. Buchanan* (i). And, therefore, although we read an entry respecting Thomas Vesey in 1634, they have no right to go back and make use of an entry of 1629, and to explain one Bishop's meaning in having used certain words by what another Bishop said at a

(a) 2 *Russ.* 76.

(c) 10 *East*, 109.

(e) 8 *Ad. & El.* 170.

(g) 3 *Stark. N. P. C.* 6.

(b) 3 *Bing. N. C.* 418.

(d) 2 *Jac. & W.* 464, 478.

(f) 2 *B. & A.* 185.

(h) 2 *Stark. N. P. C.* 184.

(i) 10 *Ad. & El.* 548.

distance of fifty years therefrom. The *dicta* of Abbott, C. J., in *The Queen's case* (a), will be relied on; but that authority has been more than impeached by the recent authority of *Prince v. Samo* (b).

Seventh and Twelfth Exceptions.—The Triennial Visitation Books cannot be admitted to be evidence of a collation, when the collation itself would not, as we shall prove, be evidence, if forthcoming. This brings us to the twelfth exception, viz., to the admissibility of an original collation. If the Bishop had given evidence of original title, it might be contended that the collations would be evidence; but if no original title on the part of the Bishop was proved, they are, on the issues in this case, inadmissible to establish title in the Bishop. Acts of ownership by him are of no value in the case of a disputed advowson, because it is his duty to fill the vacancy for the performance of Divine Service, and on lapse. The acts, therefore, being equivocal, and consistent with the plaintiffs' title, they cannot establish title against him. The lawful patron is never out of possession by the act of the Bishop, because he is *negotiorum gestor*, or a species of attorney made by the law to do that for the patron, which it is presumed he would do for himself, if there were not some hindrance—*Hobart*, 154, 316; *Com. Dig. Eglise. M.* Collation never makes a plenary, and, therefore, the patron is not turned out of possession—*Green's case* (c); *Boswell's case* (d); *Queen v. Archbishop of York* (e), which latter case shews that it makes no difference whether the Bishop claim as ordinary or as patron: *Mallory's Qu. Imp.* 26, 76, 79;—and the reason why collations make not a plenary is, because the Bishop would be judge in his own cause; 2 *Gibson's Codex*, 813, *note*. If, therefore, one collation be inadmissible to prove title, no number of them can be admitted to prove the same.

Eight, Ninth, Tenth, and Eleventh Exceptions.—The returns of the Bishops to the First Fruits writs are inadmissible in evidence; for it does not follow that because a public Officer acts in obedience to a writ, he can, therefore, use that return as evidence in his own favour. The purposes of the writ are fiscal; and its exigency does not require that the collation, or mode of presentation should be stated, as an usurper would be liable to the First Fruits, although removed upon *quare impedit*: *Le Roy v. Priest* (f). The return, moreover, goes on to state, what is not required by the writ, the name of the predecessor of the Incumbent and the period of his enjoyment of the living, which is of vital importance in this case as evidence of the collation having been *pleno jure*, because within six months from the vacancy. The return ought not, therefore, to have been read, or, at all events, no part of it except that which was

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(a) 2 Br. & B. 297.

(b) 7 Ad. & El. 684.

(c) 6 Rep. 29, a.

(d) 6 Rep. 50, a.

(e) Cro. Eliz. 200; S. C. Leon. 226.

(f) Sir W. Jones, 340.

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Mr. T. B. C. Smith, Q. C., and the *Solicitor-General*, with whom was Mr. Smyly, against the exceptions.

All the disputed evidence is not only consistent with, but confirmatory of, the fact of the original title in the advowson being in the bishoprick of Derry. The Crown entered into the articles of 1609, whereby it was agreed, among other things, that the city of London should have the patronage of all the advowsons in the lands to be undertaken by them, including that of Camus; but the parties afterwards discovered that the Crown had not title. On this, Bishop Montgomery, who was the first Protestant Bishop of Derry, being desirous of effectuating the object of the Crown in the promotion of the plantation of Ulster, surrenders the fifteen advowsons to the Crown: and the Crown immediately re-grants six of them, not specified by name, to the Bishop, reciting that the fifteen were the ancient possessions of the See of Derry, hoping by that means to attain the object in view; but which failed, and became ineffectual, by reason of the refusal of the Dean and Chapter to confirm the original transfer. The subsequent King's letters, in favour of Bishops Babington and Hampton, prove this to have been the nature of the transaction,—and the continued possession by the Bishops ever since are conclusive on the subject. We admit that the recovery of 1299 was evidence against us, but no possession was proved under it. We also admit that the title was rightly deduced from Richard De Burgo to the Crown in 1609. Next comes the Inquisition of Limavady, finding that this advowson belonged to the Crown, signed by Bishop Montgomery, among other Commissioners; which, however, could not bind his successors, as he had no power to convey the premises in question without the consent of the Dean and Chapter; and yet it is insisted on as an estoppel against us. Then come the articles of January 1609, which is subsequent to August 1609, O. S., and these it is endeavoured to connect with the letters patent of 1613, to the exclusion of the intermediate documents tendered by us in evidence, viz., the surrender, the patent, and the two King's letters.

These instruments, which are the subject of the first four exceptions, were rightly admitted in evidence. They were not offered as proving title from the Crown, but for the purpose of shewing recitals of the Crown recognising the ancient title of the Bishoprick of Derry, on which we stand. Two things it was necessary for them to establish; first, that the plaintiffs had title; and, secondly, that they had a possession under it. With reference to both of these points, the evidence of the defendant

(a) 1 Cro. & J. 451.

is to be taken, and it is to be considered, whether it is applicable to either of them. The Crown must be considered as the plaintiff in this case, and the real plaintiffs must be bound by every thing binding the Crown previous to 1609. Now, these four documents would be evidence against the Crown. The Crown may grant by letters patent, and, therefore, they may by the same admit title; and, in that point of view, the patent of 1610, admitting the ancient title of the Bishops of Derry, is manifestly admissible as evidence for us; and if so, the surrender and the King's letters are also evidence for us—all of them referring to one and the same thing. If, then, they are admissible, on the supposition that the Crown is plaintiff, how can the existence of articles of agreement with a body that was not incorporated for three years afterwards, and which could not have been enforced against the Crown, preclude them from being given in evidence? The case of *Crease v. Barrett* (a) is not distinguishable from this case.

We shall next consider the admissibility of the collation of Thomas Richardson, which is the subject of the the twelfth and last exception; because if that which is the primary evidence be inadmissible, the returns to the First Fruits writs, and Triennial Visitation, and First Fruits, books, which are only secondary evidence of the same, cannot be admitted. An original collation, like this, being a direct act of ownership over the property, is, we say, evidence of title in the Bishop. How otherwise is the Bishop to prove the possession? The argument on the other side must go the length of insisting that no number of collations could prove the Bishop's title.—[Mr. *Boyd*. Not to presume a grant.]—If, then, we are right in our argument, that the first four documents are evidence of title, the plaintiffs' reasoning falls to the ground. The production of a lease to prove title is every day's practice, and *Woolway v. Rowe* (b) shews the length to which Courts will go to prove the possession of an incorporeal hereditament. In cases of lay patronage, presentation is evidence of title and possession, as appears from the note to the case of *The Mayor of Hull v. Horner* (c), which is recognised in *Gibson v. Clarke* (d); and why a collation, not equivocal, but *pleno jure*, by a Bishop, should not have the same effect, it is difficult to conceive. The provisions of the 3 & 4 W. 4, c. 27, ss. 30, 31, shew that in the opinion of the Legislature such a collation is the exercise of a right adverse to the patron, because they state that the possession under it is adverse to the right of presentation of the patron. The arguments on this head, on the other side, were suggested to the Court in the case of *The Bishop of Meath v. The Marquis of Winchester* (e); but they go on the

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(a) 5 Tyrw. 466.

(b) *Ante*, 205.

(c) Cowp. 103.

(d) 1 Jac. & W. 162.

(e) 10 Bligh. N. R. 440.

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assumption that the Bishop is admitted not to be the patron. Such an argument is in this instance a *petitio principii*—the very point at issue being whether the Bishop has, or has not, title.

Assuming, therefore, that the original collations would, if produced, be evidence, we say that, in their absence, the Triennial Visitation books, which are the subject of the seventh exception, were properly received as secondary evidence of the same. These books are made under an ecclesiastical canon; *Rogers' Eccles. Law*, 896; and by a public Officer in performance of a public duty; they must, therefore, be taken to represent what they pretend to represent, and, consequently, be evidence of collations, if the collations themselves would be evidence; *Arnold v. The Bishop of Bath and Wells* (a); *The King v. The Bishop of Ely* (b).

The next class of secondary evidence of collations are the returns to the First Fruits' writs, and which are the subject of the eighth, ninth, tenth, and eleventh exceptions. There is no question as to the admissibility of the writs; but it is objected—first, that the returns are no evidence; and, secondly, that parts of them are not evidence. We say, that the entire are evidence, inasmuch as it was the duty of the Bishops to make the returns, and because the writs enjoining the returns to be made “without any omission whatever;” they do not exceed the exigencies of the writs. It was necessary that the Bishop should shew whether the clerk had been instituted, collated, or inducted, in order to the ascertainment of the liability to the First Fruits. This case is stronger than that of a Rector or Vicar making an entry, which, although ruled not to be evidence for himself, is nevertheless admissible for his successor; because no pecuniary, or immediate benefit can accrue therefrom to the Bishop; *Parsons v. Bellamy* (c). Even the entry of a private company has been admitted; *Glynn v. The Bank of England* (d). The principle on which they are admissible was laid down by Lord Ellenborough in *Roe v. Rawlings* (e), in which he stated, that there were several instances in the books, where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence after his death. The same principle was ruled in *Gyfford v. Woodgate* (f), and in *Price v. Earl of Torrington* (g), and the other cases collected in 1 *Smith, L. C.* 139.

Lastly, the First Fruits books, which are the subject of the fifth and sixth exceptions, are clearly evidence for us, if the collations and Bishop's returns are so; because the entries therein are made up from the Bishop's

(a) 5 Bing. 325.

(c) 4 Price, 198.

(e) 7 East, 290.

(b) 8 B. & C. 112.

(d) 2 Ves. sen. 43.

(f) 11 East, 297.

(g) Salk. 285.

returns, for which we proved an unsuccessful search—unless the objection of their being copies of copies be relied on. To such an objection we may, however, reply, in the first place, that the copies are made in performance of a public duty, and being copies of ancient dates they are not subject to the same strictness as those of later dates; *Bullen v. Mitchell* (a); 1 *Stark. on Evid.* 66 & 343; 1 *Phil. on Evid.* 285. There is, however, another answer to the objection, in the circumstance of the plaintiff's having used the same books as evidence in support of his case, and without them he could not have sustained his title. They resort to the books to shew entries containing particular expressions, and we claim a right to search the same books for an explanation of the meaning of those ambiguous terms. So that the objection, if otherwise valid, has been waived by the acts of the plaintiffs themselves.

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1842.
April 20.

The writ of error in this case has been brought to reverse a judgment of the Court of Common Pleas, upon the trial at Bar of a *quare impedit*, in which the right to present to the church of Camus in the diocese of Derry and county of Londonderry, was in controversy between the parties.

The errors assigned are founded upon twelve exceptions taken by the plaintiffs in Error to the opinions of the Judges of the Court below; all of these exceptions were on the admissibility of certain documents which were produced on the trial by the defendants, and which were given in evidence by him. The case was very fully argued in this Court during the last Easter and Trinity Terms, when the late Lord Chief Justice presided here; and it is in consequence of his having ceased to be a member of the Bench that it now becomes my duty to pronounce the judgment.

Before entering upon the exceptions, it will be right to state what were the principle issues knit between the parties upon this record. These were, first, upon the seizin of *James the First* of the advowson of the church of Camus; secondly, on the seizin of the plaintiffs, the Irish Society, thereof; thirdly, on possession thereof by presentation by the Crown.

The evidence of title relied on, on the part of the plaintiffs, was—first, a recovery in an action of *quare impedit* by the Earl of Ulster against the then Bishop of Derry in the year 1299; second, the statute of the 10th of *Hen.* 7th, c. 15 (1483); third, the inquisition of Limavady, bearing date the 30th of August 1609, finding “that all presentations, “rights of patronage, and advowsons of churches within the said county “of Coleraine, do of right belong, and appertain to the King's Majesty.”

(a) 4 Dow. 298.

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fourth, the articles of the 28th of January 1609, and their ratification by the Privy Council of England on the 4th of February 1609; fifth, the patent to the Irish Society by *King James the First*, dated the 29th of March 1613, and, *inter alia*, granting to them the advowson of the church of Camus—being the church in dispute in this cause. The plaintiffs also gave evidence of a presentation by the Crown to Camus on the 14th of May 1619, and institution thereupon by the then Bishop of Derry. They also gave evidence of subsequent *admissions* by the Bishops of Derry in 1634 and 1672, of Thomas Vesey and Jonathan Edwards respectively; upon whose presentation was not shewn, but suggesting an inference from the terms used, that the admission was upon a lay patron's presentation, and not upon the Bishop's title.

The plaintiffs having closed their case, the defendant offered in evidence a surrender by George Bishop Montgomery to *King James the First*, dated the 1st of August 1610. This was a surrender of the possessions of the See of Derry to the Crown—it was not confirmed by the Dean and Chapter of Derry; and it was enrolled in the Rolls Chapel in England, but was not enrolled in Ireland. The reception in evidence of this document was objected to by the plaintiffs' Counsel; it was, however, admitted by the Court, and forms the subject of the first exception.

The defendant secondly offered in evidence a grant, dated the 3rd of August 1610, from *King James the First* to Bishop Montgomery, of the former possessions of the See of Derry, with certain exceptions. This document was also enrolled only in the Rolls Chapel in England. The plaintiffs' Counsel objected to the admissibility of that patent in evidence; it was, however, admitted by the Court, and is the subject of the second exception.

The defendants also offered in evidence a patent of the 11th of August 1610, to Brutus Babington, Bishop of Derry, and another of the 21st of December 1611, to Bishop Hampton. These documents were also objected to by the plaintiffs' Counsel, but having been admitted by the Court, form the subject of the third and fourth exceptions upon the record.

The defendant then, for the purpose of proving collations by the Bishops of Derry to the benefice of Camus, offered in evidence the books called First Fruits books, and proposed to read entries therefrom. The admissibility of these books for that purpose, on the part of the Bishop, form the subject of the fifth and sixth exceptions.

The seventh exception is taken to the admission of the Triennial Visitation book of the Archdiocese of Armagh. The eighth, ninth, tenth, and eleventh exceptions are taken to the admissibility of the certificates of the Bishops of Derry in answer to the First Fruits writs; and the twelfth exception was to the reception in evidence of the colla-

tion of Thomas Richardson, the late Incumbent of the living of Camus, on the 23rd of June 1821. E. T. 1842.
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The first and second exceptions raise an important question in the case—the objections in support of both resting, first, upon a general ground common to both; and, secondly, upon separate and distinct grounds applicable to each. With respect to the general ground of objection, it stands thus:—The surrender of Bishop Montgomery, dated the 1st of August 1610, was offered in evidence, on the part of the defendant, for the *specific purpose* of shewing an admission on the part of King James the First, that the advowson of the church of Camus did anciently belong and appertain to the Bishoprick of Derry; and the exception taken to its admissibility is, that it was not legally admissible in evidence *for the purpose aforesaid*. The grant to Bishop Montgomery, dated the 3rd of August 1610, was also offered in evidence for the *same specific purpose*, and the exception to it is taken in the same terms.

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The first matter to be considered is, whether, independently of any distinct ground of objection applicable to either document—and supposing, for the present, no such distinct objections to exist—these two documents are legally admissible for the *specified purpose* for which they were each of them offered in evidence. Upon this question, it would appear, that the surrender and grant were admissible for *that purpose*, and were made so by the evidence given on the part of the plaintiffs, and especially by the Commission of the 21st of July 1609, and the return to that Commission of the Inquisition of Limavady of the 20th of August 1609—this evidence, on the part of the plaintiffs, authorising the defendant giving the surrender and grant in evidence, if not as direct evidence of title by the passing any interest by the operation of these instruments, yet, as furnishing an inference arising from the acts of the Crown itself on record of an ancient title in the Bishops of Derry to several advowsons in the county of Coleraine, of which the living of Camus appears to be one; and thus affecting and contravening, or, at least, rendering questionable the inference afforded by the Inquisition of the absence of any such title in the Bishops of Derry. The specific objections to these documents (the surrender and grant respectively) remain to be considered.

The first exception raises the question, whether the surrender of the 1st of August 1610 was admissible evidence for the defendant, to shew that the advowson in question did anciently belong to the Bishoprick of Derry, inasmuch as that surrender was not confirmed by the Dean and Chapter; and as to this, it may be admitted that this instrument did not, and could not, operate as a valid and legal surrender, not having been confirmed by the Dean and Chapter of Derry. It must also be admitted, that, *standing alone*, it is the act of the Bishop only, and could not

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affect the Crown or the Crown's grantee ; but if considered in connection with the grant or patent of the 3rd of August 1610—an instrument plainly founded upon the surrender of the 1st of August in the same year, both being contemporaneous acts, and both enrolled together—an acceptance of a surrender by the Crown may thus be reasonably presumed, and the admissibility of the surrender and of the patent, wherein both form one transaction, may be consistent together. Was, then, the patent of the 3rd of August 1610 admissible in evidence for the Bishop, and against the plaintiff, or not ?

The non-enrolment of this instrument in Ireland cannot affect its admissibility. The Irish statute of the 35 *G. 3*, c. 39, sets that question at rest. It is entitled, “An Act for confirming grants heretofore made by patents under the Great Seal of England.” It recites—“That whereas “many grants have been heretofore made, by patents under the Great “Seal of England, of lands, tenements, and hereditaments within this “kingdom, and doubts have arisen whether such grants be valid : for the “removing such doubts, preventing litigation, and confirming the title of “all persons deriving under such grants, be it enacted by the King’s “most excellent Majesty, &c., that all grants heretofore made of any “lands, tenements, or hereditaments within this kingdom by letters “patent under the Great Seal of England, shall be valid in law to all “intents and purposes as if the same had been passed under the Great “Seal of this kingdom.”

But the main ground of objection is, that the patent of 1610 is void, having been founded on the supposition of a surrender which had not, in fact, been made ; that the King was deceived in his grant, and that, therefore, the grant itself was utterly void. A short answer to this objection may be found in the Irish statute of the 10 *Car. 1*, sess. 3, c. 5, whereby (probably to meet such an objection as the present) this patent to the Bishop of Derry is expressly validated against the Crown itself. “Whereas since his late Majesty King *James*, of ever blessed memory, “his endowment of the Archbishoprick of Armagh, and the Bishopricks of “Derry, Clogher, Raphoe and Kilmore, with lands, tithes, and other “hereditaments, some questions may arise concerning the validity of leases “made by the said Archbishop and Bishops, and of the validity of the “Archbishop and Bishops’ letters patent from his said Majesty : for the “clearing of all doubts, and securing the said Archbishop and Bishops’ “grants so passed unto them, and of the farmers of the said lands, and “that the said Archbishop, Bishops, and farmers, may be encouraged to “build and plant the same, according to his said Majesty’s pious inten- “tion : be it enacted by the King’s most excellent Majesty, &c., that “whatsoever gifts or grants of any lands, tenements, tithes, pensions, “portions, or hereditaments, which were either found by the great “office taken in the year of our Lord 1609, to have belonged to any

“Herenaghs, or Corbes, or were by any other title devolved and come unto the Imperial Crown of this realm, and are by any letters patent given or granted to the said Archbishop or Bishops, and to their several successors respectively, shall be for ever from henceforth esteemed good and effectual in law, as well against the said Herenaghs and Corbes, and their pretended heirs and successors, as against the King’s Majesty, his heirs and successors; and that whatever lease, leases, or confirmations of leases, shall within five years next coming after the first day of this present Parliament, be severally and respectively made by the Most Reverend Father in God James Lord Archbishop of Armagh, Primate of all Ireland, or by the Right Reverend Fathers in God, James Lord Bishop of Clogher, John Lord Bishop of Raphoe, William Lord Bishop of Kilmore, and John Lord Bishop of Derry, or any of them, or by any of their respective successors, with the consent and approbation of the Lord Deputy or other Chief Governor or Governors of this kingdom for the time being, of any lands, tithes, or hereditaments, belonging to their several and respective archbishopricks and bishopricks (so as the present or greater rent be reserved), for any term not exceeding three score years from the first day of this present Parliament, shall be good and effectual in the law, to all purposes against the King’s Majesty, his heirs and successors, and against the said Archbishop and Bishops and their successors, severally and respectively, notwithstanding the want of confirmation by a legal Dean and Chapter, or any other defect—saving to all others than to the King’s Majesty, his heirs and successors, and the said Herenaghs and Corbes, and their heirs and successors, and the said Archbishop and Bishops, and their successors respectively—all such right and title as they have, or may have, if this Act had not been made.”

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But, besides, it is by no means clear that the King was deceived in his grant to Bishop Montgomery. He and his advisers must have known that the surrender of August 1610, was not valid without the confirmation of the Chapter; perhaps this could not, at the time, be had. The settlement of Ulster was then a matter of much moment, and instead of waiting for a confirmation of Bishop Montgomery’s surrender, the course pursued was to grant the patent, taking a covenant from the Bishop for the obtaining a surrender from his Chapter thereafter. But it is said, that the King was deceived as to the fact of the advowsons in the county of Coleraine having been formerly in the patronage of the Bishop, because it appears of record by the inquisition of Limavady, that these advowsons were always in the patronage of the Crown. The patent itself, as well as the patent to the Irish Society, given in evidence by the plaintiffs, supplies an answer to this objection, if one were wanting; for they shew that the contrary was asserted by another document, viz., the general survey exemplified in Dublin on the 16th of January, in the

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seventh year of the reign of King *James the First* (1609). This general survey was not produced in evidence, but its existence at the period of the patent of 1610 is manifest from the evidence on both sides, and its non-production was accounted for. The truth seems, therefore, to have been, that doubts were entertained as to the Crown's title to make these grants to the Irish Society, and others which were in contemplation for the settlement of Ulster; and that this transaction of the surrender of the Bishop of Derry's possessions, and the grant of the patent of 1610, was resorted to in order to remove all difficulties; and the subsequent patents to Bishop Babington and Bishop Hampton tend to the same conclusion. The Court, therefore, has no difficulty in overruling the first and second exceptions, and also in overruling the third and fourth exceptions, which are to the admission of the patents to Bishop Babington and Bishop Hampton, and which appear to depend upon the same grounds.

Next, with respect to the fifth Exception, and the sixth Exception.—Upon proof made of the loss of the records of the diocese of Derry previous to the year 1603, and of the loss of the original writs and returns from which the First Fruits books are made up, the defendant offered the First Fruits books in evidence, to shew a collation to the disputed benefice by the Bishop of Derry in the year 1629; and the question is, was the book admissible for such a purpose?—I leave for the twelfth Exception the consideration as to whether the collation itself, if produceable, should have been admitted.

Now, it is plain, that the First Fruits book is a public book, kept in the office of the Board of First Fruits, while that Board had existence; and I believe I may say, that those books have been admitted upon similar trials on many occasions within the memory of us all; and this book was used by the plaintiffs themselves upon this very trial, for the same purpose as that for which the defendant resorted to it; and if it be, as it is confessed to be, good secondary evidence of admission on presentation, it is difficult to see why it is not also good secondary evidence of admissions upon collation.

The seventh Exception objects to the admission of the Primate's Triennial Visitation books, as secondary evidence of a collation and institution to the rectory of Camus M'Cosquin. Now, this is also a public book, kept by a public Officer for public purposes—kept by the Registrar of the Archbishop of Armagh, in the registry of that diocese. It is plain, that if the original collation would be evidence for the defendant, that this book should be received as secondary evidence of it.

The eighth, ninth, tenth, and eleventh Exceptions, are objections to receiving in evidence the original First Fruits writs, and the Bishop's returns thereto. These writs and returns were offered only as secondary evidence of collations. The writs issue from the Court of Exchequer under the authority of the statute law of Ireland (the 29 G. 3, c. 26, s. 5);

and the Bishop's returns are made in obedience to these by the Bishops, as public officers, and they are recorded in the Court of Exchequer for the purposes of the First Fruits statutes. It is true, these returns are the acts of the Bishop, and they may not be against his interest in certain cases; but they come within that class of cases in which the contemporaneous acts and entries of a public officer in the course of his public duty, are held to be admissible in evidence, even for persons deriving under the public officer. They are here used only as secondary evidence of lost collations, and if the collations would be of themselves admissible, we are of opinion that the returns in question are also admissible, as affording secondary evidence of their contents.

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The twelfth Exception is to the admission of collations by the Bishop's predecessors, as evidence of possession being, not in the plaintiffs, nor in the Crown, but in the See of Derry. Now, one of the material issues knit upon this record is as to the possession; and what evidence of possession can the Bishop give in his predecessors, but the evidence of collations to the disputed benefice, and the enjoyment of the clerk collated thereunder? It may happen, that uninterrupted possession, evidenced by continued collations and enjoyment thereunder, may be the only evidence a Bishop can give of his title to collate—and title is another of the issues joined in this record. It is true, that the evidence of collations, and possession thereby shewn, is equivocal, and subject to explanation. It may be shewn that the collation was upon lapse, or merely to fill the Church, or without title—and then not operative; but the distinction admits the principle that collations are evidence of possession, and may be evidence of title. It may be true, also, that no number of collations will make a title against a clear right of advowson—the Bishop cannot gain a title by usurpation; but it may be, that continual possession, shewn by repeated collations, may be evidence of original title, and of a title not capable of being evidenced in any other way.

The result is that all the Exceptions must be overruled, and the judgment of the Court of Common Pleas affirmed.

Let the Exceptions be overruled, and let the judgment of the Court of Common Pleas be affirmed.

H. T. 1842.
Common Pleas.

Jan. 31.

The defendant having entered a rule to stay proceedings until costs of plaintiff not proceeding to trial were paid, may afterwards apply for a conditional order on the plaintiff to pay the said costs, without discharging the aforesaid rule. A defendant in ejectment for non-payment of rent, may be required to confine his defence to the lands in his actual possession.

MR. BAKER shewed cause against a conditional order obtained by the defendant, that the plaintiff should pay the costs of not having proceeded to trial at the last Assizes, pursuant to his notice, which had been withdrawn too late. A rule to stay proceedings, until the costs were paid, had been entered at the commencement of the Term. The defendant, it was contended, was disentitled to the conditional order by having entered the foregoing rule. He ought to have adopted one of the two courses—either to enter the rule, to stay proceedings, or to apply for the conditional order. At all events, the rule ought to have been discharged before the application for the conditional order was made; and not having done so, he is disentitled to the costs of the order.

Mr. Baker also moved a cross-notice, that the defendant should confine his defence to the lands in his actual possession. An affidavit was made by the Attorney, stating that the defendant was interested in only a small portion of the land in the ejectment, and to which he had been called on by notice to confine his defence.

Mr. Isidore Blake.—As to the conditional order, we have been perfectly correct in our proceedings—the practice in this Court being the same as that of the Queen's Bench, as stated in *Gilman v. Connor* (a), viz., that the entry of the rule to stay proceedings within the first four days of Term is a condition precedent; and, if the costs are not paid, the second motion becomes necessary. With respect to the plaintiff's motion, this being an ejectment for non-payment of rent, we were not bound to confine our defence in the manner required—*Coots v. Grady* (b). The rule is so laid down in *Longfield on Ejectment*, 167.

DOHERTY, C. J.

The case cited does not support the principle, that there is any distinction between ejectments on the title, and for non-payment of rent, in regard of the plaintiff's motion; we must therefore grant it. On the other hand, the Counsel for the defendant has been correct in his view of the practice as respects the recovery of the costs for not proceeding to trial. Therefore,

Let the conditional order be made absolute, and the plaintiff's motion granted, and no costs to either party.

(a) 1 J. & S. 673, *note*.

(b) *Jones*, 131.

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Common Pleas.

WATSON v. ARMSTRONG.

Jan. 31.

MR. PERRIN applied for a substitution of service of a *scire facias* on the defendant, who was living in America. His brother, against whom a separate judgment had been entered for the same debt, had been served for him, and had informed the plaintiff that his brother, the defendant, had no law or land agent in this country, but that any communication addressed to him through a certain house in New York, would reach his hands.

The Court granted a conditional order for substitution of service of a *scire facias* on the brother of the consor, against whom a separate judgment had been entered for the same debt, the consor residing in America.

DOHERTY, C. J.

You may take a conditional order for substitution of service on the brother, serving him with this order, and forwarding a copy of the same to the direction in New York, furnished to you by him.

CROMIE v. BROWNE.

Jan. 31.

MR. P. BLAKE moved to make a consent a rule of Court. The consent was, that a judgment of 1837 should be amended by entering it up for the full penalty, the judgment having been entered up by mistake for the principal sum in the bond only. The bond was produced.

The Court will not, on consent of the parties, allow a judgment to be amended on the roll, by increasing the sum for which it was entered by mistake from the principal to the penalty of the bond.

DOHERTY, C. J.

We cannot allow the amended judgment to be entered up as of 1837, notwithstanding the consent of the parties, as intervening purchasers, and incumbrancers may have been misled, and their interests would, consequently, be affected. The judgment must be entered as of this Term.

H. T. 1842.
Common Pleas.

TAAFFE v. KELLY.

Jan. 31.

A judgment may be revived by the personal representative of the *cestui que trust*, the personal representative of the person in whom the legal estate was vested being out of the jurisdiction.

MR. M. FALLON moved for a *scire facias* to revive a judgment of 1809 for £1200. The conusee was dead, and his executrix lived out of the jurisdiction. The bond was for the benefit of the brother of the applicant, and she was his administratrix. Interest had been paid to herself up to October last.

DOHERTY, C. J.

You may take the order.

Lessee BOYLE v. CASUAL EJECTOR.

Jan. 31.

When several parties had taken defence in an ejectment, the Court compelled them to consolidate their defences, and each of them to furnish the plaintiff with a bill of particulars of the lands for which he had severally taken defence.

MR. J. J. MURPHY, Q. C., moved that several parties who had taken separate defences might be directed to consolidate their defences, and to furnish each a bill of particulars of the lands for which he had severally taken defence.

MR. *Baker*, for the defendant.—We have no objection to consolidate our defences. But no special grounds have been suggested for the demand of the particulars of our several defences, and we are not bound to submit. The plaintiff, if he succeeds, may—and the rule of the Court is, that he ought—to execute his *habere suo periculo*. A great deal of the land might be in commonage, and if so, we should be deprived of the benefit of our mutual testimony.

The Court granted the motion in both particulars.*

* The following are the terms on which defences will be consolidated:—"That each and every of the said several defendants may be at liberty to set up at the trial any separate defence and distinct title he or they may have; and that the plaintiff shall pay the defendant or defendants who may be acquitted, his or their costs of suit, notwithstanding there should be a verdict against the other defendant or defendants."—*Lessee M' Cormick v. Macalister*, 2 F. & S. 268. To these terms, the Exchequer, in the case of *Lessee Lord Bandon v. Casual Ejector*, 14th June 1838, and the Queen's Bench, in the case of *Lessee Earl of Egremont v. Slack*, 2 L. R. N. S. 127, have added the following:—"And that such consolidation of defences be without prejudice to each of the said defendants giving evidence, at the discretion of the Judge, for the other, if, independently of such consolidation, they would have been admissible witnesses in point of law."—See, also, *Smith v. Gray*, 1 J. & S. 684.

H. T. 1842.
Common Pleas.

WYNNE *v.* SHEA.

Jan. 26.

THIS was an action for assault and battery, which had been tried in Easter Term 1836, and in which the Jury had found a verdict for the plaintiff of one farthing damages, and sixpence costs. The costs had been taxed and paid by the defendant to the plaintiff's Attorney shortly after the trial.

Mr. *Shea*, on the part of the defendant, now moved that the plaintiff, or his Attorney, be directed to pay over to the defendant the amount of his taxed costs so paid to him; and that the plaintiff do, moreover, pay to the defendant the amount of the costs incurred by him in defending the action. As to the first part of the motion, the defendant paid the costs in ignorance of the provisions of the 2 G. 1, c. 11, ss. 14, 15, which enacts, that when the verdict shall be under 40s., there shall be no more costs than damages, unless the Judge certify, which was not done in this case. As to the second part of the motion, Counsel contended, that by the finding of the Jury, according to the true construction of the aforesaid act, the action must be deemed to have been frivolous and vexatious; and, consequently, as such a pleading ought never to have been filed, the defendant was entitled to have his costs.

Per Curiam.

As to the second part of the motion, there is nothing in the Act of Parliament which could bear the construction contended for, of giving the defendant his costs in any case in which the verdict was against him, no matter what may have been the amount of the damages. And as to the first part of the motion—although the Statute of Limitations cannot, strictly speaking, be said to run against the claim, yet, there is a limitation in the discretion of the Court; and, in the exercise of it, they do not think it competent for them to entertain a motion of this nature after such a lapse of time.

No rule.

In an action of trespass for assault and battery, which was tried upwards of five years before, in which the Jury found one farthing damages for the plaintiff, and the costs were taxed and paid by the defendant, in ignorance of the 2 G. 1, c. 11, ss. 14, 15, the Court refused to direct the plaintiff or his Attorney to repay the amount to the defendant; *Held, also*, that where the verdict has been for the plaintiff, the defendant is not entitled to have his costs, no matter what may have been the amount of damages found.

H. T. 1842.
Common Pleas.

FITZSIMON, Public Officer of the National Bank of Ireland,

v.

LYONS.

Jan. 24.

The defendant having pleaded a recovery in the Assistant Barrister's Court, *probat per recordum*, the plaintiff replied *nul tiel record*, concluding with a verification, and giving a day to the defendant to bring in the record, and set down the cause for argument: *Held*, that the plaintiff was irregular in not having given the defendant an opportunity of rejoining.

The Court can issue a *certiorari* to bring up the record of the Assistant Barrister's Court.

THIS was an action by the Public Officer of the National Bank of Ireland, as indorsee of a bill of exchange, against the defendant, who was the acceptor. The defendant pleaded a previous decree for a recovery in the Civil Bill Court of Rathkeale, in the county of Limerick, by one Robert Potter, as *Public Officer of the said National Bank*, of the sum of £19. 1s. 4d., for the non-performance of the said identical promise and undertaking, and full costs, &c., as by the record and proceedings thereof still remaining in the said Court, may more fully appear, and which said decree still remains in full force and effect, not satisfied or made void, and this he is ready to verify, &c. To this the plaintiff replied, on the 15th of January, *nul tiel record*, concluding with a verification, and giving the defendant a day (the 18th of January) to bring in the record. The cause was set down, on the certificate of the plaintiff's Counsel, for argument on the 18th instant. The defendant served a notice, that when the cause came on for argument, he would move that the said replication, and the order founded on it, be set aside for irregularity.

Mr. O'Shaughnessy now moved the foregoing motion, or for a *certiorari* to the Clerk of the Peace to return the tenor of the record. The irregularity complained of, was the having obtained an order for argument without giving the defendant an opportunity of rejoining or demurring. He had no opportunity of seeing whether it was rightly pleaded or not—for instance, it might have been a case in which the conclusion ought to have been to the country. If it were a record of this Court which had been pleaded, the rule would be, to set it down at once, as in this case, for argument; but the rule is different where the record pleaded is of another, and more especially of an inferior Court; *Moore v. Garrett* (a); *Adney v. Vernon* (b); *Cramer v. Wickett* (c); *Jackson v. Richey* (d). These cases take the distinction between a record of the Court itself, and that of another Court. Therefore, on principle, on authority, and by reason of the practical inconvenience

(a) 2 Salk. 566.

(c) 1 Lord Raymond, 550.

(b) 3 Lev. 233.

(d) 7 Taunt. 30.

of the course taken by the plaintiff, there has been an irregularity in his proceedings.

H. T. 1842.

Common Pleas.

FITZSIMON

v.

LYONS.

As to the *certiorari*, it has been enacted by 36 G. 3, c. 25, s. 16:—
 “That the Court held by the said Assistant Barristers, and every of
 “them, for hearing and determining the said causes in a summary way, by
 “English bill or paper petition, shall be a Court of Record.” And by
 the 18th section* of the same it is provided:—“That the Clerks of the
 “Peace respectively shall keep a book for the entering and registering
 “of such causes, and shall enter and register the same; and such book
 “shall be a record of the respective county to which it shall belong.”—
 [*Per Curiam*. Have you been able to discover any precedent for such
 an application?—None; but there can be no doubt but that, having
 the right, we are entitled to ask the assistance of the Court in this
 respect.]

Mr. O'Hara, *contra*.—The cases cited are old authorities; but the
 recent books of practice make no difference between the fact of the
 record being of this Court, or of another Court. For instance, the rule
 is laid down generally in *Ferguson's Pract.* 360, without any distinction
 of the nature suggested by the Counsel for the defendant. Also in
 2 *Tidd*, 801, it is stated, that when the record is of another Court, the
 plaintiff may either conclude his replication of *nul tiel record*, by giving
 the defendant a day to bring it in, or with an averment and prayer of

* The books specified in the 36 G. 3, c. 25, s. 18, are declared by the same section
 to be records of the respective counties to which they shall belong; and yet, strange
 to say, very few of the Assistant Barristers' Courts are furnished with such books.
 However, the Court in which the decree pleaded in the foregoing case was pronounced,
 happening to be furnished with the book required by the act, a transcript of the entry
 therein was returned, and it appeared on the face of it that the recovery was for the
 same amount claimed by the plaintiff in this action, by one Robert Potter *as Public*
Officer of the National Bank, against Patrick Lyons (the defendant), *farmer*; but the
 Clerk of the Peace had indorsed on the back of his return, that the additions of the
 parties had been inserted by him from his own recollection, the same not appearing
 on the record. The defendant insisted that he was entitled, on the face of the return,
 to judgment; and the plaintiff objected;—on which, the Court stated that the return
 being admittedly incorrect, on the application of the plaintiff they would have no
 hesitation in quashing the writ, and issuing another, the return to which would not, of
 course, contain the addition of the parties; and that, consequently, the judgment must
 be then given for the plaintiff, with additional costs to the defendant. The defendant
 accordingly submitted to have judgment against him. The foregoing circumstances
 demonstrate, not only that it is absolutely necessary for the security of suitors that the
 several Assistant Barristers' Courts should be furnished with the books specified in the
 act of Parliament, but also that it is of the highest importance that the same should
 be kept with accuracy and correctness—more especially under the lately increased
 extent of their jurisdiction.

H. T. 1842. debt and damages ; and that in the former case, the issue is complete
Common Pleas. upon the replication ; *Tipping v. Johnson* (a).

FITZSIMON

v.
LYONS.

DOHERTY, C. J.

That case (*Tipping v. Johnson*) does not decide the position laid down by *Tidd*. There has been clearly an irregularity, and the defendant is, therefore, entitled to have the case taken out of the law list, the plaintiff giving him notice to plead. But as the 36 G. 3, c. 25, clearly puts the Assistant Barrister's Court in the position of an inferior Court of Record, there can be no doubt of our power to issue a *certiorari* ; and it is better, under the circumstances, that it should issue at once to bring up the record on next Monday, when we can decide the case on inspection.

(a) 2 Bos & Pul. 302.

H. T. 1842.
Common Pleas.

COOPER in replevin v. HAMILTON.

Jan. 22.

REPLEVIN of goods distrained for arrears of a rent-charge. To the declaration, which was in the usual form, the defendant filed a cognizance, avowing the taking in the *locus in quo*, in which, &c., as bailiff of James Langrishe; and shewing for title, that the *locus in quo* is part of the lands of Graigue in the manor of Carlow, and that Henry, Earl of Thomond, being seized thereof in his demesne as of fee, did, by indenture of the 10th of June 1707, bargain and sell the same to certain trustees therein named for the term of one year, by virtue whereof, and by force of the Statute of Uses, the said trustees became possessed of the said lands; and being so possessed, the said Henry, Earl of Thomond, having the reversion, by indenture of the 11th of June 1707, released the same, in consideration of his marriage, to the said trustees on certain trusts, by which all the lands were settled on himself for life, with remainder to his male issue of the marriage in tail male—remainder in fee to himself. That by virtue of this settlement the said Henry, Earl of Thomond, became seized for life with remainder in fee to himself, expectant on default of issue male of his said marriage; and being so seized, by indenture of the 26th September 1712 (of which profert was made), granted, bargained, and sold for a pecuniary consideration, viz. £21, a certain part of the lands of Graigue in fee farm, to Thomas Cooper, in the actual possession of the said Thomas Cooper *then being, as tenant thereof* to the said Henry, Earl of Thomond, for a term then unexpired, yielding and paying the yearly sum of £7 sterling and receiver's fees; and that the said Thomas Cooper did thereby grant the said yearly rent and receiver's fees to the said Henry, Earl of Thomond and his assigns, with a clause of distress. That by virtue of this indenture, the said Thomas Cooper became seized of the granted premises, subject to the said rent and fees. That by indenture of the 14th February 1721 (of which profert was made), the said Henry, Earl of Thomond, granted, bargained, and sold all his estate in the lands of Graigue, and all rents and services issuing out of the same to James Hamilton (then in his possession being); by virtue of which James Hamilton became seized of the said lands, yearly rent, and receiver's fees, for the life of the said

In replevin of a distress for a rent-charge, the defendant, in his cognizance, set out deeds which made title to part of the lands on which it was charged, as well as to the rent-charge itself; *Held*, that it was not necessary to plead the lease and release as distinct deeds, as the conveyance might be resorted to as grants at common law.

Held, that it is not necessary to aver continuance of *seizin* in fee of the rent in the party distraining at the time of the distress; and that an averment at the conclusion of the cognizance, "that the *locus in quo* is, and at the time when, &c., was part of the premises granted and released by the deed of 1712, and by virtue of which deed the premises therein mentioned were charged with, and made subject to, the

said yearly rent, *to be* issuing and growing thereout; and because a certain sum at the said time when, &c., was due, &c."—a sufficient allegation of the lands being charged with the rent at the time of making the distress.

Held, that it is not necessary to make profert of a deed making a tenant to the *præcipe*, and leading the uses of a recovery.

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Henry, Earl of Thomond, with the reversion in fee expectant on the failure of issue male of the marriage. That on the 30th of September 1730 Lady Thomond died without issue, whereby the said James Hamilton became seized in fee in possession of the said lands, rent, and fees; and being so seized, did by his will, bearing date the 27th of June 1769, devise all his estate both real and personal, including the said premises with the appurtenances, to Robert Hamilton and Benjamin Geale and their heirs, in trust to convey one moiety of the same to his son John Hamilton for life, with remainder to his first and other sons in tail male, remainder to his (testator's) son, James Hamilton, jun., remainder to his first and other sons in tail male; and at the same time to convey to his said son James Hamilton, jun., the other moiety of the said premises, with remainder to his first and other sons in tail male, with divers remainders over. That the said James Hamilton, the testator, died on the 20th of November 1771, whereupon and whereby the said Robert Hamilton and Benjamin Geale became seized of the said land, rent, and fees; and that Robert Hamilton died in 1783, leaving Benjamin Geale him surviving, who thereupon became seized of same; and that the said Benjamin Geale died in 1793, leaving John Geale his eldest son and heir, who thereupon became seized of the said land, rent, and fees. That the said John Hamilton afterwards died in 1793 without having had issue, and on the 19th of October 1800, James Hamilton, jun., died, leaving Hans Hamilton his eldest son him surviving; and by reason of the premises aforesaid, the said Hans Hamilton became entitled to said lands, rent, and fees; and on the 28th of June 1800, the said John Geale by indenture of bargain and sale (of which profert was made) granted, bargained, and sold to the said Hans Hamilton and the heirs of his body, all the said lands, rent, and fees (the same being in the actual possession of the said Hans Hamilton), whereby he became seized in tail of the same—and being so seized, by indenture bearing date the day and year last aforesaid, the said Hans Hamilton granted, bargained and sold unto John Hamilton (in his actual possession then being as therein mentioned) and his heirs, among other things, the said lands, rent, and fees, for the purpose of making a tenant to the *præcipe*, with an agreement that a recovery should be suffered by Henry Hamilton, and enure to the use of the said Hans Hamilton, his heirs and assigns, for ever. That in Hilary Term 1801 a recovery was duly suffered by the said Henry Hamilton, by virtue whereof the said Hans Hamilton became seized to him and his heirs of and in the said yearly rent and receiver's fees. That the said Hans Hamilton being so seized, by his will, bearing date the the 21st of April 1816, devised all his lands and rents (including the said rent and receiver's fees) to James Langrishe and Thomas Ball and their heirs, in trust to raise money for payment of debts, legacies, &c., and subject thereto, to the defendant for ninety-nine years (if he should so long live), to be computed from the death of the testator.

That the said Hans Hamilton died on the 28th of December 1822, whereupon the said James Langrishe and Thomas Ball became seized in fee of the said yearly rent and receiver's fees; and being so seized, the said Thomas Ball died on the 21st of January 1829, whereupon the said James Langrishe become seized of the said rent and fees in his demesne as of fee. The defendant then averred that the *locus in quo* is, and at the time when, &c., was part of the premises granted and released by the deed of the 26th of September 1712; and by virtue of which deed the premises therein mentioned were charged with, and made subject to, the said yearly rent and receiver's fees, to be issuing and growing thereout; and because a certain sum at the said time when, &c., was due and in arrear to the said James Langrishe, he, the defendant, as bailiff of said James Langrishe, acknowledges the taking of the said goods and chattels in the said close in which, &c., so being part of the said premises in the said deed of the 26th of September 1712 mentioned, as a distress for the said rent so being due and in arrear; and the said rent still remains due, and in arrear, and unpaid, and this he is ready to verify, &c.

H. T. 1842.
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To this cognizance the plaintiff demurred specially, and assigned the following causes:—

1st. For that in pleading and setting forth in the said cognizance certain conveyances by lease and release, viz., the conveyance by Henry Earl of Thomond to Thomas Cooper—the conveyance by the same to James Hamilton—the conveyance by John Geale to Hans Hamilton—and the conveyance by the said Hans Hamilton to John Hamilton, it does not sufficiently, or at all, appear, nor is it stated how, or in what manner, or by what person or persons, the lease forming a part of such conveyances respectively was made; or whether any such lease was at all made; nor does it appear, nor is it stated in the said cognizance, that the person or persons, by such conveyances respectively averred to be the releasees in such conveyances respectively, had immediately previous to, and at the time of making such alleged releases respectively, any privity of estate with the person or persons thereby alleged to be the releasor or releasors in such conveyances respectively.

2nd. For that it is not in and by the said cognizance stated or alleged, that the said James Langrishe, at the said time when, &c., was seized or possessed of the said yearly rent and receiver's fees, or either of them, for any estate whatever.

3rd. For that it is not sufficiently, or at all, alleged, that at the said time when, &c., the said close in which, &c., was charged with, or subject to the said yearly rent and receiver's fees, or any part thereof.

4th. For that no profert, or excuse for omitting profert, hath been made in and by the said cognizance, of the indenture therein stated to bear date the 30th day of January 1801.

H. T. 1842.

Common Pleas.

COOPER

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HAMILTON.

Mr. Hayes, and Mr. Brewster, Q. C., in support of the demurrer.

As to the first cause of demurrer—The deed of conveyance from Lord Thomond to Cooper is a fee-farm grant of the lands, not of the rent, and states that Lord Thomond did grant to Cooper, in the actual possession of the said Thomas Cooper then being, as tenant to the said Lord Thomond for a term unexpired. This novel and unprecedented way of pleading a lease and release, is insufficient and informal; and it will lie on the other side to shew that it has all the requisites of good pleading. The lease and release are always pleaded as two distinct deeds forming one conveyance, the object being to shew that the grantee had a sufficient estate to receive a release. The provisions of the Irish statute 9 G. 2, c. 5, s. 6, which excuses profert of the lease, is confined to the subject of evidence, and has made no difference with respect to pleading. Taking it as a conveyance at common law, it is incumbent on the party pleading to set out his title good *in omnibus*, and not to call on the Court to make out title for him; *Com. Dig. Pleader, C. 34*; *Cleyburne v. Piercy (a)*—in which case Bushe, C. J., takes the distinction between replevin and covenant, stating that in the former, title is essential to the action, and should be set out correctly. All that is here stated is, that Cooper was in actual possession for an unexpired term, which is not sufficient; for an undertenant, with whom there is no immediate privity, may be in possession, and nevertheless not have an estate capable of receiving a release. The conveyance purports to be a release, and there is no allegation of a livery of *seizin*, which is requisite in every common law conveyance, in which the word “*enfeoff*” (which is the only operative word) is not used. Nor is entry under the lease alleged. The only way, therefore, in which this instrument can operate, is as a lease and release; and as such it is defectively pleaded, inasmuch as it is not shewn that the grantee had an estate capable of being enlarged; *Doe dem. Burne v. Saunders (b)*. Such a mode of pleading is censured in *Moore v. The Earl of Plymouth (c)*. The same observations apply to the three other deeds mentioned in this cause of demurrer.

With respect to the second and third causes of demurrer, *seizin* ought to have been alleged, with continuance up to the time of making the distress; whereas there is no averment that the *seizin* continued for one moment after the 21st of January 1829; *Hoole v. Bell (d)*. Nor is it sufficiently alleged that the *locus in quo* was charged with the rent distrained for, at the time of the distress made. The land might have been released at any time since the conveyance of 1712.

As to the fourth cause—no profert, or excuse for its omission, has

(a) S. & B. 422.

(b) F. & S. 21.

(a) 3 B. & A. 66.

(d) 3 Lord Raymd. 139.

been made of the deed of release of the 30th of January 1801, as was necessary; *Pentland v. Healy* (a); *Jenkins v. Peace* (b).

H. T. 1842.
Common Pleas.

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Mr. *H. H. Hamilton*, and Mr. *Berwick*, Q. C., against the demurrer.

We were driven in this case to avow specially, setting out title to the rent-charge in fee, because there was no reversion in the party claiming the rent: and the vice of the argument on the other side consists in having presented the case to the Court, as if we were making title to the lands, and not to the rent. All that the party is required to shew is, the grant of the rent, and the fact of the rent having vested in him. The deduction of the title to the lands might therefore be considered as surplusage, and would not injure the avowry, even if badly pleaded. But the pleading of the deed of 1712 is correct as a conveyance of lands, viz., as a release, or grant of a reversion to a tenant in possession, without any reference to the Statute of Uses, the words being—"in the actual possession of the said Thomas Cooper then being, AS TENANT thereof to the said Lord Thomond." In *Doe dem. Burne v. Saunders* (c), the Court held that a lease and release were a good grant of the reversion at common law, and reference to the statute was not held to make any difference. Therefore, the pleading of the conveyance of the land to Cooper is good, even if we were bound to shew it. That is not, however, necessary; for although the plaintiff treats these deeds as of lease and release, they are nothing more than conveyances of a reversion—an incorporeal hereditament, which passes by grant only; 2 *Co. Lit.* 270, a. The part of the deed of 1712 on which we rely, is the part which grants the rent-charge to which we are making title. The rest is mere inducement, and the strict rule of pleading would not apply to it; *Cleyburne v. Piercy* (d). In this view, it will be seen, that privity of estate could not have been required in any of the conveyances specified in the first cause of demurrer, except that of 1712; and in that the specific allegation of Cooper being in possession "as tenant," would be sufficient. All the other conveyances are only pleaded as grants.

As to the second and third causes—it is admitted, as far as they are concerned, that the title in fee has been rightly deduced; and nothing is better settled as a rule in pleading, than that where a party, at the commencement of his pleading, lays down time and place as an averment, it extends to all subsequent averments, if they are coupled with it; *Com. Dig. Pleader*, C. 19; *Taylor v. Welsted* (e); *Webb v. Turner* (f). The averment at the conclusion of the cognizance expressly connects the liability of the *locus in quo* with the time of making the distress, stating that it was charged by the deed of 1712 with the rent to be issuing out of

(a) Al. & N. 164.

(b) 6 M. & W. 728.

(c) Ante, 228.

(d) Ante, 228.

(e) Cro. Jac. 143.

(f) And, 251.

H. T. 1842. it, and that it was in arrear at the time when, &c., viz., the time of making
Common Pleas. the distress. Nor was it necessary to plead continuance of the estate of
 COOPER Langrishe at the time of making the distress, inasmuch as being an estate
 v. in fee, its continuance is a legal inference, and as such would not be tra-
 HAMILTON. versible; *Hone v. Woodhouse* (a).

As to the remaining cause of demurrer, viz., omission of profert of the deed of 1801, making a tenant to the *præcipe*, and leading the uses of the recovery—James Langrishe derives under the will of Hans Hamilton; and, therefore, if Hamilton need not have made profert, we need not do so. Now, it is not necessary to make profert of a deed making a tenant to the *præcipe*, or of a conveyance operating under the Statute of Uses, because they are made to, and supposed to be in the possession of, a third party, viz., the tenant to the *præcipe*, or the feoffee to uses; 1 *Wms. Saund.* 9, a; and, therefore, in no point of view was profert of this deed necessary. *Penland v. Healy* and *Jenkins v. Peace* do not apply, as they were cases of common law conveyances, whereas Hans Hamilton, from whom Langrishe derives title, took under the recovery, and by operation of the Statute of Uses alone.

DOHERTY, C. J.

This case has been argued with singular ingenuity; and although there appeared to be some difficulty in it, I have little to say, except to overrule the demurrer on all the points, and give judgment for the defendant. I ought to state, that the causes of demurrer have been vaguely expressed; and as to the second and third, the facts have failed the party demurring. As to the first cause, the party pleading was not bound, as it was insisted, to plead the conveyances specified, as operating under the statute; as it is clear they may be resorted to as grants at common law. As to the necessity of profert of the deed mentioned in the fourth cause of demurrer, there is nothing in the objection. It has been already often and clearly settled, that profert need not be made of conveyances which take effect by virtue of the statute, and this deed is of that nature. At all events, it was made to a third party, which excuses profert. On these grounds, we

Overrule the demurrer.

(a) S. & B. 301.

H. T. 1842.
Queen's Bench.

JOSEPH BOYCE and THOMAS RICHARDSON

v.

MORGAN JONES.

(*Queen's Bench.*)

1841.
June 1, 4.

1842.
Jan. 13.

TRESPASS.—This was an action of trespass for taking a mariner's compass, the property of the plaintiff. The case was tried at the Sittings after Michaelmas Term 1840, before Crompton, J.; and at the trial a consent was given in evidence, whereby it was admitted that the plaintiffs were the owners of the steam ship, *Mercury*; and the right and title of the defendant, as proprietor of the Skerries lighthouse, to receive all tolls legally payable under and by virtue of the 3 G. 2, c. 36, *Eng.** (the Skerries Act), and the letters patent therein recited, and his *seizin* thereof was thereby also admitted. It was thereby further admitted that the said ship *Mercury*, was upon the 5th of June 1840, in the port of Dublin, and had, upon the 27th of May preceding, come into said port from the port of Cork, through St. George's Channel; and that the defendant demanded from the plaintiffs, in the right aforesaid, the sum of one penny per ton upon the tonnage of said ship, for the duties payable to the defendant in respect to the said ship for said voyage, as proprietor of the Skerries lighthouse; and same having been refused, that the said defendant, to compel payment thereof, took and seized the said mariner's compass. This taking was the subject of the present action.

These facts having been proved, the learned Judge proceeded to charge the Jury, whereupon the Counsel for the defendant insisted that inasmuch as it appeared from the evidence that the vessel the *Mercury*,

Vessels sailing from Cork to Dublin through St. George's channel, are not subject to the toll given by the 3 G. 2, c. 36 (the Skerries Act) to the proprietor of the Skerries lighthouse.

Ireland or Irish ports are not included in the words "foreign ports or places," within the meaning of that Act.

Seem, this statute is binding on Ireland.

* This statute recites a patent of Queen *Anne's*, which granted license and authority to one William Trench to erect a light-house upon the island or rock of Skerries, and also power and authority "to demand, collect, receive and take of and for every ship, hoy, bark, &c., or other vessel (except ships at war), which should pass to, from or by the said island or rock Skerries, or in sight thereof, or having any benefit by the said lighthouse, the duty of one penny upon every ton according to the burden of the ship, &c., which should pass to, from, by or near the said island or rock Skerries, or shall or may have any benefit by the said lighthouse, although such ship or vessel do not usually pass in or to any of our ports, havens," &c., except from necessity, for a term of sixty years. The statute then recited, that said lighthouse had been erected, and that the expense of maintaining the same was much more than the duties annually collected, owing as well to the want of sufficient powers to compel masters and owners of vessels to pay these duties, as to several defects and omissions in the letters patent, and particularly in not obliging foreigners to pay double duties; and that it was desirable to continue said lighthouse after the expiration of said term of 500 years, and it did thereby vest fully and absolutely all the powers, rights and privileges

H. T. 1842.
Queen's Bench.

BOYCE
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had immediately preceding the taking of the said mariner's compass, on her voyage from Cork to Dublin, sailed in St. George's Channel to the southward of Dublin; the toll claimed by the defendant was due at the time of the said taking; that the said taking, as a distress, was lawful; and that the learned Judge should direct the Jury that they should find their verdict for the defendant: but the learned Judge refused so to tell or direct the Jury; but, on the contrary, told them that said matter and facts were not sufficient to entitle said defendant to their verdict; whereupon the Counsel for the said defendant excepted to the opinion and directions of the learned Judge; and the Counsel for said defendant further insisted that his Lordship should direct the Jury that the said ports of Cork and Dublin were, within the meaning of the Skerries Act, "*foreign ports*," and that as said vessel had, immediately before the taking, sailed from Cork through St. George's Channel, the toll, for which the defendant took the said compass as a distress, was due; and the taking thereof, as a distress, was lawful; and that they should find their verdict for the defendant; but the learned Judge also refused so to tell or direct the Jury; but, on the contrary, the said learned Judge told said Jury that the said port of Cork and Dublin were not foreign ports, within the meaning of said Act; whereupon the Counsel for defendant again excepted to the opinion and direction of said learned Judge at said trial; and the learned Judge having obtained the consent of the Counsel for said plaintiffs and defendant, to a collateral issue or question to the said Jury, directed the said Jury to find whether or not the steam vessel, the Mercury, on her said voyage from Cork to Dublin, might have had any benefit from the Skerries lights; and on said issue being found in the negative by the said Jury, the said learned Judge directed said Jury to find their verdict for said plaintiffs; whereupon the Counsel for said

granted to said Trench, in one Sutton Morgan, who had become the assignee of said Trench, and in his heirs and assigns. And it proceeded—"That from and after the 24th day of June 1780, the said Sutton Morgan, his heirs and assigns, are hereby authorised and empowered to demand and collect, receive and take of and from the masters and owners of any ship or vessel, &c., passing, crossing or sailing in or through St. George's Channel by Holyhead or Wicklow, to or from any foreign port or place, or which shall pass or cross the said channel, to or from any port, creek or place in Great Britain southward of Holyhead, from or to Wicklow, or any port, creek or place northward thereof in the kingdom of Ireland, or that shall pass, cross or sail to or from any port, creek or place northward of Holyhead, either to or from any foreign or other port or place, and sail between Holyhead and the Calf of Man, or any way in St. George's Channel to the southward of Dublin; and likewise from all coasters passing to or from any port, creek or place in Great Britain north of Holyhead, or to any port, creek or place southward, the sum of one penny per ton coming into, and the like sum of one penny per ton going out of the said ports, places, creeks or harbours in Great Britain or Ireland as aforesaid. and double such duties for any *foreign* ship, vessel or bottom passing, crossing or sailing in the like manner, according to their respective burthens."

defendant again excepted to the said opinion and direction of said learned Judge; and the Jury gave their verdict for the plaintiffs, for six-pence damages and six-pence costs.

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Mr. *Blackburne*, Q. C., and Mr. *Radcliffe*, in support of the exceptions, having read the preamble of the statute which recited the patent, said that the manifest intention of the Legislature was to give to the patentee much greater benefits than he had hitherto enjoyed, in consideration of the advantages which the public derived from the lighthouse; and that they had a right to call in aid the preamble, for the purpose of discovering the true construction of the enacting part of the statute. *Mason v. Armitage* (a), and *Dwarrie on Statutes*, 762. The present case comes within one or other of two classes of vessels mentioned in the statute; that is, it is either within the description of a vessel "sailing in or through St. George's Channel by Holyhead, to or from any foreign port or place," or one "sailing any way in St. George's Channel to the southward of Dublin." That ports in Ireland fall within the description of foreign parts is plain from several acts of Parliament; 8 *Eliz. c. 13*; 18 *Car. 2, c. 2*; 32 *Car. 2, c. 2*; 20 *Car. 2, c. 7, s. 5*; 31 *Car. 2, c. 2*; 1 *W. & M. c. 12*; 2 & 3 *Anne, c. 14, s. 6*; where the words are "from Ireland or any other foreign ports;" 5 *G. 1, c. 18*; 8 *G. 1, c. 18* or 15; 22 *G. 2, c. 37*; 6 *G. 3, c. 35*; 31 *G. 3, c. 30*; 33 *G. 3, c. 35*; these statutes were all passed before the Union, but even since the Union Ireland has been called a foreign country; 4 *G. 4, c. 72, s. 6*. In several cases the same proposition has been decided; *Battersby v. Kirk* (b) and *Lane v. Bennett* (c); and in *Rex v. Walker* (d) it was held that Ireland was a foreign country, upon the ground that it was beyond the seas. The 18 *G. 3, c. 142* or 42, and the 18 *Car. 2*, amended by the 26 *G. 3, c. 60*, expressly provides that Ireland or Irish Ships are not to be considered as foreign within the meaning of these statutes, which proves that the Legislature thought they would come within that description, if they were not thus excepted from it. The word *foreign* is used in different senses, to be collected from the context where it is found; *Johnson's Dict.* and *Jacob's Law Dict. T. Foreign*; and in the present instance, its meaning may be best arrived at from considering it in reference to the preamble of the statute. As to the objection that this act is not binding upon Ireland, they are estopped from relying upon that point by the 6 & 7 *W. 4, c. 79*, whereby a power of distress for these tolls is given to the persons entitled to receive them; and it cannot be said that Irish coasters were meant to be excepted, for a vessel sailing from Belfast

(a) 13 *Ves. 35*.

(b) 2 *Bing. N. C. 584*; *S. C. 3 Scott. 11*.

(c) 1 *Tyrw. & G. 441*; *S. C. Mees. & W. 71*.

(d) 1 *Wm. Bl. 286*.

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or any port northward of Holyhead to Cork, or any port southward of Dublin, would be clearly within the words of the act of Parliament.

Mr. *Smith*, Q. C., and Mr. *Gayer*, with whom was Mr. *Boyce*, for the plaintiff.

The statute does not apply to a case like the present, or justify the seizure made by the defendant for toll upon a vessel trading between the ports of Ireland. We do not dispute the right of the Crown to make this grant, but we contend that the Crown of England had no right to give to the defendant a power of levying this toll by distress. The 6 *G.* 1, c. 5, was strongly resisted by the Irish; the 22 *G.* 3, c. 53, repealed that statute, and the 23 *G.* 3, c. 28, s. 1, declares the right of the people of Ireland to be bound only by their own laws. The 21 & 22 *G.* 3, c. 48 (*Yelverton's Act*), enacts that some of the laws of the British Parliament should be binding on Ireland; but what are the enactments thus recognised? First, the statutes relating to forfeited estates; secondly, private statutes relating to landed property; and thirdly, all clauses concerning commerce as import to impose equal restraints on the subjects of England and Ireland, and to entitle them to equal benefits. The last class is the only one within which this case could be by possibility brought, but it is impossible to contend that the Legislature had in their contemplation, at the time of framing that clause, such an act of Parliament as the *Skerries Act*, or intended to refer to a case at all like the present. The 6 & 7 *W.* 4, is an act passed for the purpose of placing the control of all lighthouses in Trinity House; and the 54th section leaves Mr. Jones precisely where it found him. If there had been a distress by the Trinity House, supposing the Commissioners to have purchased this lighthouse, the question could not have arisen—for by the 55th section, an express power is given to the Commissioners to sue for tolls transferred to them, in any British or Irish Court. The next question is, what is the true construction of the patent and the act of Parliament, supposing this statute does extend to Ireland? The meaning of the patent manifestly was, that vessels deriving benefit from the lighthouse should be subject to the toll; and it was distinctly proved at the trial that the nearest point to which vessels sailing from Cork to Dublin went to this lighthouse was forty miles. The word “by” used in the patent must be, by a reasonable construction, held to mean “close by,” and not to apply to vessels sailing in the same parallel of latitude. In construing a statute like the present, which imposes burdens upon the people, the Court will lean in favour of the public; *Gildart v. Gladstone* (a); *Scales v. Pickering* (b); *Guthrie v. Fisk* (c); *Casher v. Holmes* (d); *Stourbridge*

(a) 11 East, 685.

(b) 1 Moo. & P. 205; S. C. 4 Bing. 448.

(c) 3 B. & C. 185; S. C. 2 Dowl. & Ry. 24, and 3 Stark. 153.

(d) 2 B. & Ad. 597.

Canal Company v. Wheeley (a); *Waterhouse v. Keene* (b); *Denn v. Diamond* (c); *Webb v. Manchester and Leeds Railway Company* (d); *Regina v. Ruscoe* (e); *Trinity House v. Sorsbie* (f); *Matson v. Scobel* (g); *Pole v. Johnson* (h); *Smithett v. Blithe* (i); the last case is a decision upon this very act of Parliament. It is impossible to hold that the Irish ports are foreign ports, within the meaning of the statute; and if they be not, then this case cannot come within the first clause of the section in the act of Parliament; and it clearly is not within the second clause, because that only includes voyages from England to Ireland and *vice versa*; the third clause does not either embrace it, for it merely includes vessels sailing in a diagonal direction crossing the channel; and then, there only remains the fourth, within which, it has been contended, the present case does fall; but we, insist that upon the true construction of this statute, the third and fourth clauses must be read as one, and that the fourth means voyages in a diagonal direction also, proceeding from the westward. Moreover, the fact of English coasters being specially mentioned in the clause, proves that it was not the intention to include Irish coasters; and also the provision which subjects *foreign* vessels to double duty, and which would thereby subject Irish vessels, if Irish ports are to be considered foreign ports, to double duty also. Several statutes might be cited to shew that the Legislature frequently speaks of foreign ports as contradistinguished from Irish ports; for example, 1 *Car.* 2, c. 18—3 & 4 *Car.* 2, c. 11—26 *G.* 3, c. 66; and the cases cited on the other side upon this part of the case do not bear out the position contended for.

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BURTON, J.,

Jan. 13.

This day delivered the judgment of the Court. Having stated fully the facts of the case, his Lordship said—

The defendant's title to the toll in question was founded upon an English statute, the 3 *G.* 2, c. 36 (the Skerries Act), and the letters patent recited therein. Upon this Act of Parliament two questions were raised, and discussed upon the argument of the bill of exceptions: first, whether this statute was binding on Ireland; and secondly, supposing it to be binding on Ireland, whether, upon the true construction thereof, vessels sailing from Cork to Dublin through St. George's Channel were subject to the toll thereby given. It was contended, on the part of the plaintiff, that the 3 *G.* 2, which empowers the defendant to collect this

(a) 2 B. & Ad. 792.

(b) 4 B. & C. 200; S. C. 6 Dowl. & Ry. 257.

(c) 4 B. & C. 245.

(d) Nicholl, H. & C. Railway Cases, 576.

(e) 3 Nev. & P. 428.

(f) 3 T. R. 768.

(g) 4 Burr. 2258.

(h) 2 Wm. Bl. 764.

(i) 1 B. & Ad. 509.

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toll, being an Act of the English Parliament, and passed before the Union between England and Ireland, is not binding upon vessels in Irish ports ; and that for that reason no distress for the toll in question could be legally made in Ireland ; but this objection was not much relied on. Little stress was laid upon this objection by the plaintiffs' Counsel, it being felt that the Act of 21 & 22 G. 3, c. 48 (Yelverton's Act), and the recognition of the rights created by the Skerries Act, which is found in the 54th section of the 6 & 7 W. 4, c. 79, had removed all foundation for this objection. Upon the first point, therefore, we are of opinion with the defendant, and hold that this statute is binding upon Ireland ; and that brings me to the construction of the statute itself, which is the second question that has been discussed. The defendant's Counsel contended, first, that as it appeared from the evidence that the vessel in question had sailed from Cork to Dublin in St. George's Channel, to the southward of Dublin, the toll claimed by the defendant from the plaintiff was thereby due, and the distress for the same legal ; and that the Judge should so have charged the Jury, and directed them to find a verdict for the defendant ; and secondly, that the ports of Cork and Dublin were foreign ports within the true intent and meaning of the said statute, and that, therefore, the defendant was also entitled to a verdict. Under the 3 G. 2, the defendant, as the proprietor of the island of Skerries, and the lighthouse thereon, is clearly entitled to toll from vessels passing through and across St. George's Channel, within certain limitations specified in the Act ; it was, however, contended on the part of the plaintiff, that vessels passing between Cork and Dublin do not come within the limitations specified in the statute—and, therefore, are not subject to the toll ; while, on the other hand, it was contended on the part of the defendant, that such vessels were subject to this toll, upon the two grounds which I have already mentioned, and which I shall now proceed to examine in their order. There are four different cases in the statute in which vessels, passing through or across St. George's Channel, are made liable to the toll in question ; first, vessels passing, crossing or sailing in or through St. George's Channel, by Holyhead or Wicklow, to or from any foreign port or place ; secondly, vessels which shall pass or cross St. George's Channel, to or from any port, creek or place in Great Britain, southward of Holyhead from or to Wicklow, or any port, creek or place northward thereof, in the kingdom of Ireland ; thirdly, vessels that shall pass, cross or sail from any port, creek or place, northward of Holyhead, either from any foreign or other port or place, and sail between Holyhead and the Calf of Man, or any way in St. George's Channel to the southward of Dublin ; and, fourthly, all coasters passing to or from any port, creek or place in Great Britain, northward of Holyhead, from or to any other port, creek or place, south thereof. It is plain that a voyage from Cork to Dublin cannot come within the terms

either of the second or of the last of the four cases I have stated, and which are the several cases for which the statute provides; for the second applies to a voyage from Great Britain to Ireland across St. George's Channel, or *vice versa* within certain limits; and the fourth applies to the case of coasters passing along the coasts of Great Britain; but the defendant's Counsel, in reading the third clause, divide it into two, making the last member of the sentence "or any way in St. George's Channel, to the southward of Dublin," constitute a sentence by itself, and making thereby a fifth case in addition to the one I have mentioned, as provided for by the statute; and if this reading were correct, the defendant would, undoubtedly, have been entitled to a verdict; for the *Mercury* did, unquestionably, upon her voyage from Cork to Dublin, sail in some way in St. George's Channel to the southward of Dublin. But this construction not only does violence to the grammatical construction of the clause I am considering, but it makes the particularity of the other clauses unmeaning and unnecessary; since all the other cases would be comprised in the generality of the description of vessels that shall pass, cross or sail "any way in St. George's Channel." The map of St. George's Channel, which was given in evidence at the trial, is the best commentary and index to the statute, and which demonstrates to the eye the accuracy and distinctness of the four cases I have enumerated, when considered in reference to that leading principle of the statute and the patent recited therein, namely—that toll should be paid for actual or probable benefit to be derived from the lighthouses, by vessels sailing in their neighbourhood. The defendant's Counsel then contended that if the voyage in question did not come within the third class of vessels made liable by the statute, that it did come within the first class—Cork and Dublin being, within the meaning of the statute, as they contended and argued, "foreign ports;" and in order to establish this position, numerous English statutes were referred to, in which it must be conceded that Ireland is designated a foreign country, and Irish ports are called foreign ports. These statutes are the Navigation Acts, beginning with the 18 *Car.* 11, c. 2; and upon the other side several statutes were also cited, in which Irish, along with English ports and places, are contradistinguished from those which are, in the ordinary sense, foreign ports and places; the sense, therefore, to be attributed to the word "foreign," in the *Skerries* Act, must be derived from the context, and the scope and intention of the framers of the statute, rather than from the meaning in which the same word may have been used in other acts of Parliament. This statute has, throughout its enactments, distinguished foreigners from natives of Great Britain and Ireland, and foreign ports and places, from ports and places in Great Britain and Ireland; for example, one of the objects of the Act is "to oblige foreigners to pay double duties;" again, vessels are subject to toll which sail "in or through St. George's Chan-

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nel by Holyhead or Wicklow, to or from any *foreign port or place*," thus contradistinguishing in the same sentence Holyhead or Wicklow from foreign ports and places; and, again, we find that foreign vessels from or to any of the said ports or places in Great Britain or Ireland, are to pay double tolls, the result of which, upon the defendant's construction, would be that Irish vessels should always pay double tolls—a construction that has not been contended for; and lastly, we find in the last clause of this statute it is enacted, that the Act shall be deemed and taken as a public Act in all the courts of law as well of Ireland as of England; an enactment which, whatever be its effect, shews pretty clearly that Ireland was not to be deemed foreign within the provision of this statute. I may add, that the construction I have put upon this statute derives much support from the language of the letters patent, as well as of the statute itself, perpetuating and extending those letters patent. The vessels subject to duty are in the letters patent described as those which should pass to, from, by, or near the island of Skerries, or in sight thereof, or have any benefit from its lighthouses; and, holding this principle in view, and looking at the channel map, the four classes of vessels made subject to the duty by the act of Parliament becomes at once clear and consistent, and warrants the verdict found by the Jury in pursuance of the directions of the Judge. Upon these grounds the Court is of opinion, that the exceptions ought to be overruled, and judgment be given for the plaintiff.

PERRIN, J., concurred in the judgment of the Court as to the second question, viz., the construction of the act of Parliament, but he desired to guard himself from being understood as expressing any opinion upon the question as to whether the Skerries Act was or was not binding upon Ireland.

Let the exceptions be overruled, and judgment be entered for the plaintiff.

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THE DUBLIN AND DROGHEDA RAILWAY COMPANY

v.

MATTHEW NASH.

1841.
May 5, 6.
1842.
Jan. 13.

DEBT.—This was an action of debt for £90, the amount of five calls on five shares of the Company, of which shares the defendant was alleged to be the *proprietor*, with interest. The defendant pleaded the general issue. The case was tried before Crampton, J., at the Sittings after Hilary Term, 1841. It appeared in evidence that Nash was the original purchaser of scrip for five shares in this Company; that in May 1836 he sold his interest in these shares, and assigned the scrip to a Mr. Connor. This sale was effected for the defendant by Labertouche and Stafford, the stockbrokers of the Company. It also appeared that

Where it appeared that A. was a subscriber for five shares in the Drogheda Railway Company, and in February 1836 executed a parliamentary contract, covenanting for himself, his executors, administrators

and assigns, to pay the amount of the shares he subscribed for, and afterwards, in May 1836, sold his shares and assigned his scrip to B., and in August in that year, an Act of Parliament* was passed, incorporating the subscribers into a Company; but A. continued as the registered proprietor of these shares in the books of the Company, and B. never claimed any rights as such assignee, and was never recognised as such by the Company:—*Held*, that A. continued liable for the amount of calls on foot of the said five shares made after the said assignment, as the *proprietor* thereof, within the meaning of the statute.

The word “assigns,” as used in the statute incorporating this Company, means statutable assigns.

Where certain calls were made by Directors, who were bound by the 96th section to pay up all calls due by them before they acted in any way, and before these calls were paid or any thing done upon them, they were again rescinded:—*Held*, that the Directors were authorised to rescind the resolution for these calls, although they had not paid them.

* 6 & 7 W. 4, c. 132—an Act for making a railway from Dublin to Drogheda—passed the 13th of August 1836. The following sections were principally relied on in the argument of this case:

Section 1. After reciting that a railway from Dublin to Drogheda would be of great public advantage, and that several persons thereafter named were willing, at their own expense, to carry such an undertaking into execution, enacted that those persons (naming them) and “all other persons and corporations who have subscribed or shall hereafter subscribe towards the said undertaking, and their several and respective successors, executors, administrators and assigns, shall be and are hereby united into a Company for making and maintaining the said railway and branch railways and other works by this Act authorised, and for that purpose shall be one body corporate, by the name and style of ‘The Dublin and Drogheda Railway Company,’ and by that name should have perpetual succession and a common seal, and shall also sue and be sued by such name, and shall exercise other powers and authorities given by [this act.]”

Section 3 enacted, “That it shall be lawful for the said Company to raise among themselves any sum of money for making and maintaining the said railway and other works by this act authorised, not exceeding in the whole £600,000, the whole to be divided into shares of £100 each; and such shares shall be numbered, &c., and shall be vested in the several parties taking the same, and their several and respective

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the Act of Parliament incorporating the Company was not passed until August 1836. The registry of shareholders was also produced, whereby the name of the defendant appeared as the *proprietor* of five shares. A deed, bearing date the 29th of February 1836, called the "Parlia-

"successors, &c., and assigns to their proper use and benefit, proportionably to the sum they shall severally contribute; and all persons and corporations and their several and respective successors, &c., and assigns, who have subscribed or shall severally subscribe for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof, towards said undertaking and other the purposes of the said subscription, shall be entitled to and receive in proportionable parts, according to the respective sums so by them paid, the net profits arising from the tolls, &c. received by the said Company when the same shall be divided by the authority of this Act."

Section 96 enacted, "That no proprietor of any share on which any call shall have been made shall, after the day appointed for the payment of the same, be allowed to vote, either personally or by proxy, at any meeting of the proprietors of said Company, or to act or vote as a Director at any meeting of the said Directors, until the money called for in respect of such share shall have been fully paid."

Section 117 enacted, "That the said Company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time as occasion may require, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of the shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made, to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said Company the sum of 2s. 6d. for every certificate; such certificate shall be admitted in all Courts whatsoever as *prima facie* evidence of the title of such proprietors, their successors, &c., and assigns to the share or shares therein specified; but the want of such certificate shall not hinder the proprietor of said shares, from selling or disposing thereof."—[A form of certificate is added.]

Section 123 enacted, "That the Directors to be appointed as aforesaid shall have power from time to time to make such calls of money from the subscribers to and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary;" and having provided that the aggregate amount of such calls should not amount to more than the sum of £100 on any such share, and that no such call should exceed the sum of £10 upon each share, and that the total amount of such calls in any one year should not exceed £40 upon each share, and that there should be an interval of three calendar months between the days appointed for the payment of such calls, and that twenty-one days' notice thereof should be given, and same be paid to the persons appointed to receive the same; and if any owner or proprietor shall not so pay his rateable proportion (of such calls), he shall pay interest for the same at the rate of £5 per cent. until same shall be paid:—"And if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest (if any) then or at any time thereafter

mentary contract," was also given in evidence, and it was proved that the defendant had executed this deed, and the several parties thereto covenanted that they would carry the railway into execution, and pay the several sums on foot of the shares for which they had respectively subscribed. It also appeared in evidence, that upon the 25th of January 1837, a call was made by a resolution of the Directors for payment of three calls, one payable upon the 1st of March, another in the following

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"it shall be lawful for the said Company to sue for and recover the same in any of his Majesty's Courts of Record by action of debt or on the case, or by bill, suit, or information; or the said Directors may, and they are hereby authorised to declare the shares belonging to such owner to be forfeited, and to order such share to be sold." It then provides that no advantage shall be taken of any forfeiture unless notice shall be given as therein directed, and for the mode in which the shares so forfeited shall be sold.

Section 125 enacted—"That in any action to be brought by the said Company against any proprietor for the time being, of any share in the said undertaking, to recover any money due and payable for and in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call or so many calls of such sums of money upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this Act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this Act, without proving the appointment of the Directors who made such calls, or any other matter whatsoever; and the said Company shall, thereupon, be entitled to recover what shall appear due, including interest computed as aforesaid, on such calls, unless it shall appear that any such call exceeded £10 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call; or that notice was not given as hereinbefore required, or that calls amounting to more than £40 in the whole had been made in some one year; and in order to prove the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said Company is by this Act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 196, after reciting that the probable expense of making such railway and other works thereby authorised, would amount to the sum of £600,000, and that the sum of £492,500 and upwards had been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators and assigns, for the payment of the several sums by them respectively subscribed for; enacted—"That the whole of the said sum of six hundred thousand pounds shall be subscribed for in like manner, before any of the powers given by this Act in relation to the compulsory taking of land for the purpose of said railway, shall be put in force."

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June, and another in the ensuing September. The second and third calls were never paid or demanded; but, by a resolutions of the Directors in October 1837, they postponed said second and third calls; and, by another resolution in January 1838, they annulled them altogether.

The plaintiffs' case having closed, Mr. *Hatchell*, Q. C., for the defendant, submitted that the defendant, who merely held the scrip of the Company, and sold and transferred that to another before the passing of the Act of Parliament, could not be considered a proprietor of these shares at the time of filing the declaration; and, secondly, he submitted that there could be only a verdict for the sum of £16. 16s., the amount of the first call, upon the ground that the other calls were made by Directors who were not competent to act, not being qualified as directed by the 96th section of the statute, as they never had paid the calls which became due in June and September under the resolution passed in the previous January; that they were, therefore, not competent in the first instance to postpone, or, in the second, to annul these calls, or to do any other act as Directors.

The sale by the defendant of his five shares was then proved, and the case closed. The learned Judge directed the Jury to find a verdict for the plaintiffs for £84, the amount due for calls on the five shares; and reserved leave to defendant to move to have it turned into a verdict for the defendant, or to have it reduced, if the Court should be of opinion that Mr. Hatchell's objections, or either of them, were well founded. They accordingly found a verdict for the plaintiffs for £84.

On a former day, a rule *nisi* had been obtained to set this verdict aside and enter a verdict for the defendant, or to reduce the verdict pursuant to the leave reserved at the trial; against which—

The *Solicitor-General (Moore)* and Mr. *Blake*, Q. C., with whom was Mr. *Leahy*, now shewed cause.—By the parliamentary contract, the defendant was clearly liable until the passing of the Act of Parliament, and could not have got rid of his responsibility by transferring them. A contract enabling a subscriber to do so would be void. *Joseph v. Pebrer* (a); *Duvergier v. Fellows* (b); *Blundell v. Winsor* (c); *Kidwelly Canal Company v. Raby* (d). The latter case is also an authority to shew that the defendant is sufficiently described as "proprietor" in the declaration: and *The Thames Tunnel Company v. Shelden* (e) is to the same effect. They also relied on the 1st, 3rd, 92nd, 96th, 111th, 121st and 122nd sections of the statute.

(a) 3 B. & C. 639; S. C. 5 Dowl. & R. 542, and 1 C. & P. 341.

(b) 5 Bing. 248, 267.

(c) 8 Sim. 601.

(d) 2 Price, 93.

(e) 6 B. & C. 341; S. C. 9 Dowl. & R. 278.

Mr. *Hatchell*, Q. C., and Mr. *Maley*, for the defendant, contended, that if this party were liable at all for the sums sought to be recovered from him, the plaintiffs have mistaken their remedy, in bringing an action of debt. The proper course would be, to have sued him upon the parliamentary contract in which he is bound by his covenant. It would be very unjust to the defendant to hold him liable for the amount of those calls while his assignee is entitled to the profits, if the speculation be a successful one.—[*PERRIN*, J., intimated, that as between the Company and the defendant, the defendant would be entitled to the profits.]—The defendant could not be considered a proprietor unless he did some act after the passing of the Act of Parliament to make him so; and in this case he had no connection whatsoever with the Company from some months previous to the passing of that Act. *Fox v. Clifton* (a); *Bourne v. Freeth* (b); *Dickinson v. Valpy* (c). If liable at all, he is liable as a subscriber and not as a proprietor: and the *Thames Tunnel Company v. Seldon* decided that a proprietor was not to be sued as a subscriber, and for the same reason a subscriber is not to be sued as a proprietor. Moreover, the 123rd section only gives this action against owners and proprietors, and not against subscribers. They have not declared against us as subscribers, but as proprietors, and they have failed to prove that we are proprietors. Upon the second objection, they contended that the Directors never having paid the call due in June 1837, were disqualified under the 96th section when they made the subsequent calls, and that the latter could not, therefore, be recovered against the defendant.

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BURTON, J., this day delivered the judgment of the Court.

Jan. 13.

Two objections were made at the trial on the part of the defendant, which were reserved for our consideration; first, that the plaintiffs did not sustain the averment in their declaration, by proving that the defendant was a "proprietor" of the shares in question; and, secondly, that the verdict ought to be reduced to the amount of the *first* call, the others having been made by Directors not duly qualified to make them. The first question turns upon the construction of the statute incorporating this Company. The defendant executed the parliamentary deed, and thus made himself a subscriber to the amount of five shares; he subsequently, and before the passing of the statute, sold these five shares; but did he thereby discharge himself from his liabilities to the Company as such subscriber, or cease to be a subscriber to this undertaking? By and under the 1st section of the Act, subscribers to the undertaking, both those who were such before the passing of the Act, and those who became

(a) 6 Bing. 776; S. C. 4 M. & P. 676. See this case, also, 2 Moo. & S. 146, and 9 Bing. 115.

(b) 9 B. & C. 632; S. C. Moo. & R. 512.

(c) 10 B. & C. 128; S. C. 5 Moo. & R. 126.

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such afterwards, are constituted members of the Company thereby incorporated; and the shares which before were only scrip, became by the 3rd section of the Act legally vested in such subscribers.—After reading the 1st and 3rd sections, his Lordship said—the defendant is not specially named in the statute, but it is plain that he is a member of the Company by virtue of the shares allotted to him, and liable to the calls legally made on account of such shares, unless his assignee would be a member of the Company in his place, and as such, a proprietor of these shares within the meaning of the statute. It is plain that at Common Law no such assignment would be valid, and accordingly by the 128th section, a provision is made for such assignments in a particular way, and the seller is held liable as before, and the buyer shall have no interest or power in the Company, until a memorial of the transfer be perfected in the manner therein provided. It appears from the 196th section that of the £600,000 to be subscribed for this undertaking, £492,500 had been previous to the passing of the Act subscribed for by several persons under a contract binding them, their heirs, executors, administrators and *assigns*: and it also appeared in evidence that the defendant was one of those who had subscribed to that £492,500. As the shares could only be assigned under some statutable provision, we are bound to take the word *assigns*, when used in this statute, as meaning statutable assigns; that is in this case “assigns” within the meaning of the 128th section. Had the assignee come in and claimed to be entitled to these shares, and been accepted by the Company and registered as the proprietor of them by the Company, the case would have been different; but he never did this—the assignee never claimed his rights under these shares, and never was recognised by the Company, or registered as the proprietor of these shares, but the defendant continued as the registered proprietor thereof. The case of *The Kidwelly Canal Company v. Raby* is in many of its circumstances like the present, and was decided upon a statute similar to the one we are now considering; and the case of *The Great North of England Railway Company v. Biddulph* (a), although not a decision, is very important upon the questions raised in this case, as the observations of Baron Parke in that case bear strongly upon the question I have been just considering, and sustain to a great extent the view which the Court has taken of this case, in coming to the conclusion that the plaintiffs are entitled to hold their verdict. Upon the second point, which was all but abandoned in the argument of this case, it appears to us that the resolution after being rescinded, was as if it never had been made; and, therefore, that the objection upon this part of the case cannot succeed, and that the verdict for the full sum must stand.

Rule discharged with costs.

(a) 7 Mees. & W. 243.

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MAY v. HODGES.

Jan. 14, 18.

THIS was an application for liberty to issue a *scire facias* against certain persons, who were stated in the affidavit to have been members of the Agricultural and Commercial Bank of Ireland, when the judgment was obtained; and also that they still continued members. The judgment on which the *scire facias* was sought was obtained against Hodges, the defendant, as one of the Public Officers of the Bank.

Mr. *Napier*, in support of the application, referred to the 6 G. 4, c. 42, s. 18, and relied upon *Cross v. Law* (a).

Per Curiam.—We will give you a conditional order.

Mr. *Napier* contended, that upon the judgment of Lord Abinger, in *Cross v. Law*, p. 223, the *scire facias* might issue without an order in this case; and that he was, therefore, entitled to an absolute order.

PENNEFATHER, C. J., on this day (Jan. 15) said, that upon the production of a certificate from the Stamp Office of the registry of members, pursuant to the 6th and 7th sections of the statute, an absolute order would be granted for leave to issue the *scire facias*.

Motion granted.

(a) 6 Mees. & W. 217.

Where a judgment has been obtained against the Public Officer of a Joint Stock Banking Company, under the 6 G. 4, c. 42, s. 18, and it is sought to recover the amount of the judgment from any of the members of such Company, the proper mode of proceeding against them is by *scire facias*. When the persons proceeded against were members of such Company when judgment was obtained, and still continued so, the order for leave to issue the *scire facias* will be absolute in the first instance.

BROWNE v. BRADY.

Jan. 22, 26.

THIS was an application to set aside a verdict. It appeared that the defendant allowed judgment to go by default, and the plaintiff obtained an order to have the inquiry to assess damages sped before a Judge, upon the usual terms. The case came on before Pennefather, C. J., at the Sittings after last Michaelmas Term, on the 4th of December, when an

vember, and was not executed until the 4th of December, but the Sittings at *Nisi Prius* commenced on the 26th of November:—*Held*, that the proceedings were regular, and that the verdict should not be disturbed upon the ground that the writ was out of return before it was executed.

Where it appeared that a writ of inquiry, which was ordered to be sped before a Judge at *Nisi Prius*, was returnable upon the 27th of No-

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objection was made that the writ, which was returnable upon the 27th of November, had been out of return for some days. The Sittings at *Nisi Prius* commenced upon the 26th of November. The case proceeded, and the damages were assessed, but the plaintiff was put under terms not to issue execution until after the first four days of the ensuing Term.

Mr. *Napier*, on a former day, obtained a rule *nisi* to set aside the verdict, grounded upon the above objection; against which—

Mr. *Monahan*, Q. C., and Mr. *Macdonagh* now shewed cause, and contended that all the proceedings at *Nisi Prius* had relation to the first day of the Sittings. *Jacobs v. Minvoni* (a); *Taylor v. Harris* (b). There is no analogy between proceedings upon writs of inquiry and trials under the Trial Act in England. The cases of *Holdipp v. Otway* (c), *Hewitt v. Mantell* (d), and *Bruce v. Rawlins* (e), shew the nature of the proceedings upon writs of inquiry, and that there is no such analogy between them and trials under the Trial Act, where the Sheriff is substituted for the Court. Moreover, the defect objected to is cured by the Statute of Jeofails; *Iles v. Pitt* (f); *Launder v. Cripps* (g); *Maud v. Barnard* (h): 17 Car. 2, c. 8, and 1 & 2 W. 4, c. 31, s. 15, were also referred to; and it was moreover contended that the defendant, by appearing at the trial, had cured any irregularity in the writ.

Mr. *Napier*, *contra*.—By the 1 & 2 W. 4, c. 31, s. 15, the writ was returnable upon the 27th of November, and the cause was tried several days after that day. Upon the 28th the Sheriff's authority, which flows out of the writ, was gone; he was *functus officii*, the writ being out of return. It could not be executed later than the return day of the writ. *Dyke v. Blakston* (i). Under the 3 & 4 W. 4, c. 42, s. 17, this very question arose in *Mortimer v. Presdy* (k), and it was decided to be a good objection; and it is also noticed in *Chitty's Sum. Pr.* 124. We have not waived the objection by appearing, having made the objection and protested against the case being proceeded with. *Blissett v. Tenant* (l).

(a) 7 T. R. 31.

(e) 2 Saund. 107.

(c) 3 Wils. 61.

(g) 2 Str. 947.

(i) 2 Lord Raym. 1449.

(b) 3 Bos. & P. 549.

(d) 2 Wils. 372.

(f) 2 Lord Raym. 1397.

(h) 2 Burr. 812.

(k) 3 Mee. & W. 602.

(l) 5 Scott, 479.

PENNEFATHER, C. J., said, that the Court were clearly of opinion that the objection was not tenable, and, therefore, the rule ought to be discharged.

Rule discharged, with costs.

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JAMES RICHARD DAY v. WILLIAM SPREAD.

ASSUMPSIT for necessaries for the support and maintenance of the defendant's wife and child. Pleas—first, the general issue; and second, the Statute of Limitations.

This case was tried before Sergeant Greene at the Cork Spring Assizes of 1841.*

It appeared by the evidence given on the part of the plaintiff, that the defendant was married to his present wife (for whose maintenance during separation from her husband, and that of her child, the present action had been brought), in July 1826: that in a few weeks after their marriage they had separated; and evidence of subsequent co-habitation in January 1827, and of the birth of a child in September 1827, was also given, and it was then proved that Mrs. Spread had resided with the plaintiff for four or five years after her separation from the defendant, and that she and her child had been maintained and supported at the expense of the plaintiff during that period. Some evidence was also given of alleged cruelty on the part of the defendant, which, it was said, caused the separation. The defendant's Counsel, on cross-examination of the plaintiff's witnesses, endeavoured to impeach the legitimacy of the child, who, it appeared, had always lived with the mother since the separation; and medical evidence was given to shew that the child might have been the offspring of the husband, considering the periods of the alleged *non-access* by the husband.

Counsel on behalf of defendant offered in evidence a decree of the Consistorial Court of Cork, dismissing a suit instituted by Mrs. Spread against her husband for a divorce, on the ground of cruelty and desertion, and also attested copies of the proceedings in that cause, which were rejected by the learned Judge. No other evidence was offered on the part of the defendant.

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In an action for recovery of necessaries supplied by the plaintiff to the defendant's wife during her separation from her husband, which was alleged to have been caused by the cruelty of the husband, or by his causeless desertion and abandonment of her:—*Held*, that a sentence of an Ecclesiastical Court, in a suit by the wife for a divorce and for alimony, grounded upon the husband's alleged cruelty, and to which the husband set up as a defence the wife's adultery, dismissing the suit, was admissible in evidence. *Perrin, J., dissente.*

Such a suit is not *res inter alios acta*.

A father is not under any

legal obligation to provide for the support of his child; and to make him liable for necessaries supplied for the maintenance of the child, there must be a contract, express or implied; nor will the fact that the father has permitted the child to live with the mother while she lived apart from him, be any evidence that she is an agent of the father, or that she has any authority from him to contract debts for the maintenance of the child, when he disputes the legitimacy of such child.

* Trial at *Nisi Prius*, 1 Ir. Cir. Rep. 141.

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The learned Judge told the Jury that the husband was, during the co-habitation, liable for necessities supplied to the wife, even although she should have misconducted herself; that in case of separation, where the husband actually allows and pays her a sufficient sum for her support, suitable to his degree and circumstances, he is not chargeable even for necessities furnished to her, although he does not pay such sums, if she have sufficient means of her own; but that if he wrongfully turn her out, or be guilty of personal ill-treatment or cruelty to her, so that she is compelled, from reasonable apprehensions of her personal safety, not to live with him, or if he deserts her without just cause, he is liable, if she does not commit adultery; that if she do so, and he on that account turns her away, or if she be guilty of adultery even after being compelled by his cruelty to quit him, and he refuse to receive her, he is not liable, even though he himself may have committed adultery. He further told them, that the duty of a parent to support a child was not of equal obligation with that of a husband to maintain his wife; that the law in the former case does not, as in the latter, presume an authority in the child to contract on the part of the father, and that to make him liable, there must be either an express contract or circumstances from which a promise of payment may be inferred; but that if a husband separated from his wife suffer his children to reside with her, a Jury will be warranted in inferring an implied agency in the wife to order necessities for such children; that the evidence to sustain such agency should be stronger with respect to the education than the mere maintenance of the child. He further told them that this related to legitimate children, and that the law presumed the child of a married woman to be legitimate, unless it clearly appeared that no access by the husband could have taken place within such a period as to render it possible that the child could be the offspring of the husband.

Counsel on the part of the defendant objected to the charge, on the ground that there was no evidence of such agency, and the legitimacy of the child being disputed, that there could be no presumption of agency. The learned Judge took a note of this objection. The Jury found a verdict for the plaintiff for £700—£500 for the maintenance of the wife, and £200 for that of the child.

On a former day, a conditional order had been obtained to set aside this verdict and for a new trial, on the ground that the learned Judge was wrong in rejecting the evidence tendered by the defendant, and also in telling the Jury there could be a presumption of agency with regard to the maintenance of the child, where the legitimacy was disputed—against which—

Mr. *Smith*, Q. C., and Mr. *Henn*, for the plaintiff, referred to *Bolton v. Prentice* (a); *Blackham's case* (b); *Brownsword v. Ed-*

(a) 1 Sel. N. P. 279; S. C. 2 Str. 1214.

(b) 1 Salk. 290.

wards (a); *Hillyard v. Grantham*, referred to in that case, p. 246; *The Duchess of Kingston's case* (b); *Hunt v. De Blaquiére* (c); and *Bull. N. P.* 244, as to the inadmissibility of the evidence tendered by the defendant; and to *Rawlins v. Vandyke* (d); *Pickering v. Gunning* (e), in support of that part of the verdict for the maintenance of the child.

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Mr. Bennett, Q. C., and Mr. Collins, Q. C., with whom was Mr. O'Shaughnessy, for the defendant, cited and relied on *Wilson v. Smith* (f); *Hunt v. De Blaquiére*; *Jones v. Bow* (g); *Clews v. Bathurst* (h); *Dacosta v. Villa Real* (i); *Prudam v. Phillips*, referred to in that case; *Rex v. Grimes* (k); *Rex v. The Mayor of York* (l); *Rex v. Hedden* (m); *Cooke v. Sholl* (n); *Rex v. Flintan* (o); *Manby v. Scott* (p), as to the admissibility of the evidence tendered; and *Cooper v. Martin* (q); *Urmston v. Newcomen* (r); *Mortimore v. Wright* (s); to shew that a contract should be clearly proved, to render the husband liable for the support of his child; and that *Rawlins v. Vandyke* (d) was not an authority for the plaintiff, the legitimacy of the child being disputed in this case.

PERRIN, J.

Jan. 26.

This was an action tried before Sergeant Greene at the last Cork Spring Assizes, for necessities supplied for the maintenance of the defendant's wife and child, founded on his alleged misconduct and abandonment of his wife; and founded also upon his wilful and faultless separation from her. His Lordship having stated the first count of the declaration, which was grounded upon the ill-treatment of his wife by the defendant, said, there was sufficient evidence upon this part of the case to go to the Jury to sustain the plaintiff's case, and that for that reason there was no ground for a nonsuit. The defendant offered no *parol* evidence, but he produced a sentence of dismissal of the Consistorial Court of Cork, dismissing a suit instituted by her against the defendant,

(a) 2 Ves. sen. 243.

(b) 2 Sm's. Leading Cases, 424; S. C. 20 St. Tr. 354; 1 Leach, C. C. 146, and 1 East, P. C. 468.

(c) 5 Bing. 550; S. C. 3 M. & P. 108.

(d) 3 Esp. 250, 252.

(e) Sir W. Jones, 182; S. C. Palm. 526.

(f) 1 B. & Ad. 801.

(g) Carth. 225.

(h) 2 Str. 960.

(i) 2 Str. 961.

(k) 5 Burr. 2601.

(l) 5 T. R. 66, 72.

(m) 2 Str. 1109.

(n) 5 T. R. 255.

(o) 1 B. & Ad. 227.

(p) 1 Lev. 4; S. C. 2 Sm's. Leading Cases, 245.

(q) 4 East, 76.

(r) 4 Ad. & E. 899.

(s) 6 Mees. & W. 482.

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for a divorce, on the ground of cruelty, and the proceedings in that cause; and it was contended by the learned Counsel for the defendant that these documents ought to have been received. The particulars of these documents do not appear, but it does appear that she failed to establish cruelty in that suit, or to obtain a divorce, and consequently alimony. In that suit, the right to alimony came in question, but only incidentally, for it alone could not be the subject of such a suit. It has not been argued that the other documents were evidence, but only that the sentence was evidence, and that it would disprove the alleged misconduct of the defendant. The Counsel for the plaintiff objected to this evidence upon two grounds: first, that it was *res inter alios acta*; and, secondly, that it was not a decision upon the matter in controversy in this action, the fact of abandonment and desertion of the wife by the husband not having been directly, but only collaterally, in issue in that suit; and, at best, to be only inferred from the decision. As to the first ground, I am of opinion that it is wholly untenable, and that it is not *res inter alios acta*. If this had been a sentence against her in a suit of jactitation of marriage or a divorce, it would plainly have been evidence in this suit against the plaintiff, according to the opinion of Bailey, J., in *Keegan v. Smith* (a) and *Hervey's case* (b); *Jones v. Bow* (c); *Blackham's case* (d). But the second objection leads to a very different consideration, and that is, whether this sentence was a judgment directly upon the matter in issue in the present action—that is, whether a sentence deciding that she had not established her right to a divorce for cruelty, and consequent alimony, and that he had not established his right to a divorce for adultery, would be admissible evidence to disentitle her to necessities, or to disprove that degree of misconduct on his part and abandonment of his wife, which was proved in this case. If it were a direct decision that she was not entitled to alimony, it would appear to me to be directly upon the point in this case, if alimony can be obtained in that Court in a case of causeless separation; but alimony could only be decreed to her in that suit in the event of her obtaining a divorce for cruelty; and dismissing that suit is only deciding that she was not entitled to such divorce, and consequently, not entitled to alimony. It does not, therefore, in my mind bear directly upon the point, and for this reason I think the learned Judge was right in rejecting this evidence. The observations of Lord Chief Justice De Grey, in the *Duchess of Kingston's case* (e), “that the judgment, neither of a concurrent nor an exclusive jurisdiction, is evidence of any matter which came collaterally in question, “though within their jurisdiction; nor of any matter incidentally cogni-

(a) 5 B. & C. 375; S. C. 8 Dowl. & R. 118.

(b) Peake on Ev. 76.

(c) Carth. 225.

(d) 1 Salk. 290.

(e) 20 St. Trials, 538.

"zable; nor of any matter to be inferred by argument from the "judgment;" and the same rule was acted on in *Blackham's case* (a). This rule is not only thus established by authority, but it is, in my mind, founded in excellent reason, for it would be exceedingly inconvenient to hold that matters of inference which were not directly decided upon, though cognizable in the case, should be supposed to be governed by the decision; for while the matter adjudicated upon is certain, the grounds of the adjudication are frequently uncertain; and it would be manifestly unjust to allow that, and not to give her a right to rebut that evidence, and say that he did, without cause, desert and abandon her. Therefore, not being a decision directly upon the point in issue, as not directly deciding that she was not entitled to alimony; but as that is only to be inferred from the decision, it does not contradict the plaintiff's evidence, and it is, therefore, in my mind within the words and reason of the case to which I have referred, and was clearly inadmissible. This case is, therefore, plainly distinguishable from the cases I have referred to above—*Henry's case* and *Jones v. Bow*; and also from *Keegan v. Smith* (b), to which I have been referred by my Brother Crampton; and, therefore, upon the grounds I have already stated, I am of opinion that the verdict for £500 for necessities supplied to Mrs. Spread, ought not to be disturbed. With respect to the verdict of £200 for the maintenance of the child, I think the learned Judge was wrong in applying to this case the doctrine of Lord Eldon, in *Rawlins v. Vandyke*. I do not think that upon the facts in this case, the defendant disclaiming the child as he did, and suffering her to remain with her mother, constituted the latter his agent, or authorised her to contract debts for its maintenance; and I feel bound by *Mortimore v. Wright* to hold, that there was no evidence to go to the Jury upon this part of the case, and that, therefore, the verdict of £700 for the plaintiff, ought to be reduced to the sum of £500; a father being only bound by contract to support his child, and not being, as in the case of his wife, under a legal obligation to do so.

CRAMPTON, J.

Although I differ from my Brother Perrin, I feel by no means a strong opinion upon the correctness of the conclusion to which I have come, in holding that the verdict ought to be set aside. Mrs. Spread has no allowance from her husband, and under such circumstances, the husband would be bound to support his wife, unless she has voluntarily separated from him, or has committed adultery. It is also plain that if she live apart from her husband in consequence of his misconduct, that she is entitled to necessities, and the party supplying them is entitled to recover the amount of them from the husband. So far as the verdict in this case

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(a) 1 Salk. 290.

(b) 5 B. & C. 377.

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relates to necessaries supplied for the child, it is admitted on all hands that that part of the verdict cannot stand; the manner in which the verdict has been taken, however, does not require that there should be a new trial upon that ground, as the damages in respect to the wife's maintenance, and those in respect to the child's, are separately assessed. With respect, however, to the admissibility of the evidence rejected, there is a serious question. The sentence offered to be given in evidence, was a dismissal in a suit instituted by the wife, for a divorce and alimony on the ground of cruelty; the defendant set up in that suit a charge of adultery against Mrs. Spread; but the sentence, in my opinion, amounts to nothing more than a dismissal of Mrs. Spread's suit, and so far proves that she then failed to establish cruelty against her husband. It must be admitted that this sentence could be no bar against proof given at the trial, of the defendant's misconduct; but, upon the other hand, as we find by the report, that cruelty on the defendant's part was asserted by plaintiff and denied by defendant, I cannot say that it is illegal or irrelevant to shew that this charge was made and attempted to be proved on a former occasion, and in reference to the same period of time, and that it was not substantiated. When I say it is admissible, I do not mean to say it is conclusive; and this is an answer to most of the cases cited against the admissibility of this evidence. In *Keegan v. Smith*, such evidence was received; that case does not supply an authority in this case; but it proves that sentences, like the sentence in the present case, are admissible in an action brought by a third person. In *Res v. Flintan*, a similar sentence was also admitted in evidence, although it was no bar to the plaintiff's action; and although in the present case the sentence is not conclusive of any thing, but that such a suit was instituted and failed, it might be relevant upon the question whether the separation was caused by the wife's misconduct, or upon the amount of damages which the Jury ought to give, if they determined to give any. As to its being *res inter alios acta*, that objection is answered by the language of Bailey, J., in *Keegan v. Smith*, to which my Brother Perrin has already referred; and, as according to the learned Judge's language in that case, Mrs. Spread may be considered as suing in the present, her own act in having instituted that suit would be evidence against her, to that extent at least. Would not this sentence be evidence against her, if she instituted a new suit of the same kind in the Ecclesiastical Court? perhaps not conclusive, but some evidence against her. *Blackham's case* has been very much relied on, and I admit that case was rightly decided; but in that case it was merely decided that the grant of an administration, although conclusive as to the fact of such administration being granted, yet that it was not conclusive as to the collateral fact of a marriage upon which that administration was founded; but the administration was given in evidence in that case; and so in the present case, this sentence is conclusive as to

such a suit having been instituted, and having failed; but it is not, I admit, conclusive for any other purpose: but is it, for that reason, wholly inadmissible? It is only upon the ground that this sentence was totally irrelevant to the matter in controversy, that this sentence could, in my mind, be rejected; and for the reasons I have already stated, I come to the conclusion that it was wholly irrelevant; and I am, therefore, of opinion that there ought to be a new trial. As this has been rendered necessary, however, by the mistake of the learned Judge, I think it ought to be without costs.

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BURTON, J., concurred in opinion with his Brother Crampton.

In my opinion the evidence should have gone to the Jury, with the learned Judge's directions as to the effect it ought to have upon them. The question as to the admissibility of this evidence, is one of very great nicety; and it is impossible for me to add any thing to what has been already said upon it. The plaintiff, in an action like the present, stands precisely in the same position as if the wife were plaintiff, whose separation from her husband is the foundation of the claim; and he is bound to justify that separation, and is also bound by the acts of the wife, precisely as she herself would be bound, if she instituted this action. This being the case, would this sentence—pronounced in a former suit instituted by the wife, and founded upon the cruelty of the husband, and seeking alimony—be evidence against her in a subsequent suit instituted for the same purpose, and resting upon the same allegation of cruelty? I have no doubt it would. I do not mean that it would be evidence sufficient to conclude the claim she might make, but it would be evidence to lessen and detract from her claim. The plaintiff is precisely in the same position; and I do, for that reason think, that it would be also evidence against him.

Rule absolute without costs.

H. T. 1842.
Queen's Bench.

JOHN JACK, Lessee of WILLIAM DE MONTMORENCY
 and others

v.

WILLIAM WALSH and wife.

1841.
 Nov. 4.
 1842.
 Jan. 31.

Where it appeared that A. who lived in illicit intercourse with B., was put into possession of part of the estate of the latter in 1798; that B. died in 1829, and C., his illegitimate son by A., succeeded to B.'s estates under his will; that A. still continued to hold the premises rent free until January 1840, when she gave up the possession of the lands to C.'s steward by twig and sod, and left the premises; but her daughter-in-law and her husband, who were residing in the house with her for a number of years still continued in possession of the premises—C. having brought an ejectment upon the title; *Held*, that he was barred by the operation of the 3 & 4 W. 4, c. 27 (Statute of Limitations), and could not maintain his ejectment.

EJECTMENT on the title.—This was an ejectment on the title, to recover a house and some acres of land, part of the lands of Upperwood in the county of Kilkenny. The case was tried before Richards, B., at the Spring Assizes 1841. The first witness, Mary Buggy, proved that she went to live in this house in the year 1798, and continued to reside there for more than forty years, but she had nothing to say to the lands, except as to a small garden belonging to the house; that Haddock Morris, her son, lived in the house and managed the land; that the defendant, Catherine, was his wife and lived in the house with them; that Walsh, shortly after Haddock's death, married the defendant Catherine, and lived with them in the house for about twelve years before witness gave up the possession. It also appeared that witness and the late Sir William De Montmorency carried on an illicit intercourse, and that the lessor of the plaintiff was the offspring of that intercourse; that sometime longer than a year before the bringing of the ejectment she gave up the possession of the house and garden by sod and twig, and on that day left the premises; but Walsh and wife remained in possession of the house, garden, and land, up to the time of the bringing of the ejectment. Sir William always paid the cesses charged on these premises.

The Counsel for the defendant, amongst other objections, contended first, that the lessor's right to recover was barred by the Statute of Limitations; and secondly, that there ought to have been a demand of possession. These objections were reserved, and under the direction of the learned Judge, the Jury found for the plaintiff as to the lands, and for the defendant, as to the house and garden.

A conditional order having been obtained to set this verdict aside, and have a nonsuit entered upon the points saved—

Mr. *Hatchell*, Q. C., and Mr. *Brewster*, Q. C., with whom was Mr. *H. Martley*, Q. C., now shewed cause against making that order absolute. There was no pretence of any title in the defendant, but that arising from a bare permission to Mrs. Buggy to remain in the house. The objection as to the want of a demand of possession, is wholly untenable: it is

laid down in 2 *Phil. on Evidence*, 7th ed. 271, that such a demand is not required from a person who has a mere permissive occupation in the premises sought to be evicted. And as to the objection founded upon the Statute of Limitations, that either cannot be sustained; *Jackson v. Wilkinson* (a) decides, that any acknowledgment of a permissive occupation of the premises, will prevent the Statute of Limitations from running; citing *Bull, N. P.* 104, where it was so held, even if the acknowledgment were made one hundred years after the commencement of such permissive occupation. The same principle is ruled in *Doe dem. Souter v. Hull* (b); *Thompson v. Clarke* (c); and *Doe dem. Thompson v. Thompson* (d). The last case is a very strong case in our favour, and decides that the defendant cannot claim any title under the 3 & 4 *W. 4*, c. 27. There never was such a possession of the premises in question in *Mrs. Buggy*, as would constitute a tenancy at will; that is, she never had such an exclusive possession of the premises until the will was determined, as would constitute such a tenancy; and it is, therefore, unnecessary to argue upon the effect of the Statute of Limitations upon such tenancies. She held these premises just as Sir William De Montmorency's gate-keeper holds his house, Sir William De Montmorency paying the charges upon the land; and can it be contended that such a person acquires the fee by a permissive occupation of it for twenty years?

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v.
WALSH.

Messrs. *James Dwyer* and *David Lynch*, contra.

It was proved that the late Sir William De Montmorency gave these premises to *Mrs. Buggy* for her support. The objection, founded upon the Statute of Limitations, is clearly with us. The facts are, that *Mrs. Buggy* held these lands for forty years, taking the profits of the land, we admit, as tenant at will, but her tenancy was clearly a tenancy at will; *Anonymous* (e); *Woodfall's L. & T.* 155; *Com. Dig. Estate*, 111. In January 1840 she gave up the possession by sod and twig; and upon these facts we will demonstrate that the lessor of the plaintiff had no title to these premises in January 1840. The 2nd section of the 3 & 4 *W. 4*, c. 27, makes twenty years a bar, after the time at which the right to make an entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; and the 7th section of the statute proves that period was the day upon which *Mrs. Buggy's* tenancy commenced, or one year after that day. These two sections shew that, as the law now stands, a

(a) 3 B. & C. 413.

(b) 2 Dowl. & Ry. 38.

(c) 8 B. & C. 717.

(d) 6 Ad. & E. 721.

(e) 3 Salk. 223.

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permissive occupation of the rents and profits, after twenty years, is, under the 2nd section, a bar to the right of the landlord. The whole doctrine of adverse and *non*-adverse possession, is swept away; and possession, whether adverse or not, without an act acknowledging tenancy, which is settled by the 14th section, operates as a bar to the right. A new bar is thus made by a *non*-adverse possession, and a bar *ex post facto*, but to prevent hardships thereby, the 15th section gives five years after the passing of the Act, during which proceedings might have been taken in cases where the possession was not adverse before the recent statute; *Lessee O'Sullivan v. M'Swiny (a)*. Therefore, in 1838 the bar of the statute had run completely against the lessor of the plaintiff; and under the 34th section his right was then extinguished; that is, his estate in these lands was gone in 1838; *Nepean v. Doe (b)*; *Shelf. on Real Property*, 179; *Hayes' Conv.* 268; 2 *Sug. Vend. & Purch.* 351, and *Doe dem. Thompson v. Thompson*, is rather with us than against us. If this were so, and that the lessor's title were extinguished in 1838, how has it been since revived? In 1840 he was a mere stranger to these premises; Mrs. Buggy was then owner in fee; what title, therefore, had the lessor when he brought his ejectment? He relied upon his title as devisee under his father's will; he cannot now shift his ground, and it is plain he can rely on no such title now. Even if he could rely upon a title derived through Mrs. Buggy, it would not help him. Unless she did some act that amounted to a *feoffment*, it could not be of any avail. Any act of hers could not amount to a surrender in fact or by operation of law, for the lessor had not at the time any estate in the lands. Neither could her act amount to a feoffment, for two reasons: first, no words of feoffment were used, for she only purported to give up possession, and not to pass an estate; 4 *Com. Dig. T. Deed*, c. 46, 4; and, secondly, because the authority to receive is not only not proved, but negatived by the evidence: the steward went to receive possession, not to take livery. 4 *Com. Dig. T. Deed*, 48, 4. As to the want of a demand of possession, it appears that Walsh was in the possession of the house and premises when Mrs. Buggy delivered up the possession. She goes away, and he continues in possession, being in lawfully under Mrs. Buggy, and so continued for a year. Under these circumstances, a demand of possession was clearly necessary before an ejectment could be sustained. *Doe dem. Cates v. Somerville (c)*; *Lessee of Wintercastle v. Newcomen (d)*; *Lessee of Lewis v. Beard (e)*; *Adams on Eject.* 107, 121.

(a) 2 Ir. Law Rep. 89; S. C. Longf. & T. 111.

(b) Sm. Leading C. 416.

(c) 6 B. & C. 126.

(d) 4 Law Rec. N. S. 100. See, also, *Ibid.* 154.

(e) 13 East, 210.

BURTON, J.

This was an ejectment upon the title for a house and some acres of land. The declaration contained four demises, but at the trial one in the name of William De Montmorency was alone relied on. There was a verdict for the lessor of the plaintiff as to the land, subject to several objections on the part of the defendant; and for the defendants as to the house. It will be unnecessary for me to consider any of these objections but that arising upon the Statute of Limitations, which, in our opinion, entitles the defendant to have the verdict set aside, and have a nonsuit entered. The premises in question were a part of the estates of Sir William De Montmorency, who, it appeared, carried on an illicit intercourse with a person named Mary Buggy, and that in 1798 he put her into possession of the premises, the subject of the present action, where she remained for nearly forty years. Sir William De Montmorency died in 1829, when the lessor's title accrued under the will of the former. Mrs. Buggy continued in possession until about a year before the trial, when she gave up the possession thereof to the steward of the lessor of the plaintiff by sod and twig, but did not give up actual possession. She afterwards left the premises, and the defendants, one of whom was her daughter-in-law and the other the husband of the latter, who had resided with Mrs. Buggy, refused to give up the possession, and thereupon the present ejectment was brought; and as I have already stated, a verdict was obtained by the lessor for the recovery of the lands. The defendants contended that a nonsuit should be entered for them, upon the ground that the title to the house and land vested absolutely in Mary Buggy under the 3 & 4 W. 4, c. 27. We are of opinion that the defendants are entitled to have a nonsuit entered upon this ground, and that the possession of Mrs. Buggy cannot be considered as the possession of a servant or gate-keeper, within which it was attempted to bring it. She is neither to be regarded in the light of a friend or dependant, according to the language in 2 *Sug. Vend. & Purch.* 351; nor is it at all necessary that the possession, to confer title under the late Statute of Limitations, should be an adverse possession. *Nepean v. Doe* (a); 2 *Sugd. Vend. & Purch.* 349. That statute has put an end to the doctrine of adverse possession, except in respect to cases coming within the 15th section, which does not apply to this case. Upon these grounds, we are of opinion that the verdict for the lessor of the plaintiff must be set aside, and that a non-suit must be entered, but, under the circumstances, without costs.

Rule for nonsuit absolute.

(a) 2 Mees. & W. 894.

H. T. 1842.

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M. T. 1841.
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WRIGHT v. MURPHY.

Nov. 19, 20.

The 7 G. 4, c. 46, *Eng.* (which is analogous to the Irish Banking Act, 6 G. 4, c. 42), is a public Act, and the 10th section* of that statute extends to actions brought in Ireland as well as in England: and, therefore, the public officer of an English Company established under that statute may, as such, bring actions in Ireland for debts due to the Company without specially setting out the statute in the declaration.

ASSUMPSIT.—This was an action of *assumpsit* brought by the plaintiff as one of the public officers of the Liverpool Banking Company, for the recovery of the amount of two bills of exchange, alleged to be due to the company as indorsees thereof. In the introductory part of the declaration it was stated, that the action was brought by the plaintiff, as such public officer, “according to the form and effect of the statute, in such case made and provided;” the bills were stated to have been indorsed to the Company, and the promises to have been made to them. The defendant demurred specially to the first count, upon the ground that it did not shew any title or interest in the plaintiff, to or in the bill therein mentioned, and that it did not allege any indorsement to him.

Joinder in demurrer.

Mr. Richard Cotton Walker, in support of the demurrer.

In this case the plaintiff sues under a statute, as the public officer of the Liverpool Banking Company, and he does not set out the statute. The statute within which this case falls is a private statute, and as such it ought to have been set out in the declaration. Acts which concern trade in general, are public Acts, but those which refer to particular trades are private; *Holland's case* (a); *Rex v. Larwood* (b); *Dwar. on Stat.* 629. Moreover, the provisions of this statute are contrary to the Common Law, and should for that reason be strictly construed; nor is there any thing in the act to extend its operation to Ireland; and in *Brandling v. Barrington* (c) a very strong opinion was expressed against extending the enactments of a statute by giving to it an equitable construction.

Mr. Napier, and *Mr. Hamilton Smythe*, in support of the declaration, contended that the 7 G. 4, c. 46, under which the plaintiff brought this action, was a public Act. It is placed as a public Act amongst the

(a) 4 Rep. 76, b.

(b) 1 Salk. 167.

(c) 6 B. & C. 467, 475.

* Enacts—“That all actions and suits, &c., against any person or persons who may, at any time, be indebted to any co-partnership carrying on business under the provisions of that Act for recovering any debts, &c., may be commenced or instituted and prosecuted in the name of any one of the public officers of said co-partnership for the time being,” &c.

statutes in the statute book ; and its object and purposes concern and relate to the public in general. In support of their views the cases of *Keily v. Whittaker* (a) ; *Hughes v. Thorpe* (b) ; *Sidaway v. Hay* (c) ; *Tronson v. Callan* (d), 1 & 2 Vic. c. 96, s. 3, were referred to.

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After stating the facts briefly said—That the Act in question must be taken to be a public Act, altering and amending an agreement entered into with the Bank of England, and which agreement was contained in a public Act, and for this reason this statute must be considered also a public Act ; and there was, therefore, no necessity for setting it out specially. Then as to the second question, whether this Act extends to Ireland, it is one passed by the United Parliament, and, therefore, capable of binding Ireland, and there is nothing to exclude Ireland from the operation of the 9th section ; and when that is so, and where we will be extending the remedial provisions of the statute by holding that it does extend to Ireland, we are bound by reason and authority to give it that construction. The cases cited for the plaintiff, as well as the case of *Bartlett v. Pentland* (e), are authorities in favour of such a construction.

Demurrer overruled.

(a) 1 Ir. Law Rep. 28.

(b) 5 Mees. & W. 656.

(c) 3 B. & C. 12 ; S. C. 4 D. & Ry. 658.

(d) 1 Hud. & B. 113.

(e) 1 B. & Ad. 704.

COOPER, Administrator of COOPER, v. FOSTER.

1842.
Hilary Term.
Jan. 29.

ASSUMPSIT.—This was an action of *assumpsit* upon a guarantee. The declaration contained four special counts upon the guarantee, and the

A. being seized of an estate for life, agreed to convey the same to B. his son, in consideration of a certain annuity, and also that the son should pay his debts, which were enumerated in a schedule annexed to the deed of conveyance. When the parties were about to execute this deed, it was discovered that a debt due by bond from A. to C. was omitted in the schedule, and A. refused to execute the deed until B. wrote a letter stating that A. "having at the time of the execution of the deed conveying his estate to me, stated that there was a debt due by him to C. in the sum of £350, which sum is not included in the schedule at foot of said deed of conveyance, I agree to secure and pay the same, &c., in order that A. may be released and discharged from payment thereof." C. accepted of this letter shortly after it was written, received two sums on account of interest upon the bond debt from B. and had not afterwards looked to A. for payment of the sum secured thereby, but B. had at one time offered to pay the whole of the principal sum to C. An action of *assumpsit* was brought for recovery of this debt by C. against B. ; *Held*, that this action could not be maintained ; first, upon the ground that if the contract by B. was considered as a collateral agreement, the letter did not shew a sufficient consideration to sustain the action ; and, secondly, in order to charge him upon it as an original undertaking, a release by C. to A., or an offer to execute such release ought to have been relied on and established.

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common counts. The first count having stated that F. B. Foster, the father of the defendant was indebted to Henry Cooper deceased, in his lifetime in £700, for which, upon the 4th of July 1831, he executed his bond to the said H. Cooper deceased, and that he released to the defendant certain freehold estates of which he was then seized ; it averred that in consideration that the said Cooper the intestate, at the special instance and request of the defendant, would forbear to sue the said F. B. Foster, the defendant, undertook and promised the intestate to pay the sum due on said bond, and then averred forbearance on the part of the said H. Cooper, and a request to the defendant to pay said sum and breach by the defendant. The second count stated, that the said F. B. Foster being indebted in £500, the defendant, upon the 11th March 1833, in order that the said F. B. Foster might be released and discharged from payment of the said debt of £500; and in consideration thereof, and that the said H. Cooper the intestate would, at the special instance and request of the defendant, forbear to seek payment of said debt, undertook and promised to pay the amount thereof; the count then averred, that the said debt was still due ; and that the said H. Cooper in his lifetime, and the said plaintiff since his death, had forborne to seek payment thereof, and that the defendant had due notice thereof, and concluded by averring a request to the defendant to pay the same, and breach as in first count. The third count stated, that on the 11th of March 1833, the said F. B. Foster was indebted to the said H. Cooper, as in the second count, and the day for payment of said sum being passed, in consideration thereof, and that he the said H. Cooper, the intestate, would release and discharge the said F. B. Foster from payment thereof, the defendant undertook and promised, &c.; and then averred that the said H. Cooper, in his lifetime, and the plaintiff, had forborne to seek payment, and alleged a request and breach, as in the former counts. The fourth count was similar to the third, except that it averred that the said H. Cooper and the plaintiff, since his decease, were always ready and willing to execute a formal release to F. B. Foster, and that after the death of the said H. Cooper the plaintiff offered the defendant to execute such release, but the defendant excused himself from so doing ; and concluded with the same averments as the other counts contained.

The defendant pleaded the general issue.

The case was tried before Crampton, J., at the Sittings after Easter Term 1841. It appeared in evidence that F. B. Foster, the father of the defendant, having an estate for life in certain lands, by deed bearing date the 11th of March 1833, in consideration of an annuity reserved thereby, and of the payment of his debts, which were set forth in a schedule annexed thereto, released and conveyed the same to the defendant. When this deed was prepared, and the parties about to execute the same, it was discovered that the debt for which the guarantee was given, upon

which the present action was brought, was by mistake omitted in the enumeration of the debts in the schedule, and the father having thereupon refused to execute the deed, the defendant wrote the following letter :—

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“Mr. Francis Blake Foster having, at the time of the execution of the deed conveying his estate to me, stated there was a debt due by him to “Mr. Henry Cooper, of Mary-street, in the city of Dublin, coachmaker, “in the sum of £350, which sum is not included in the schedule at foot “of said deed of conveyance, I agree to secure and pay the same, or so “much thereof as is now justly due, in order that the said F. B. Foster “may be released and discharged from payment thereof.—Dated the “11th of March 1833.

“ROBERT B. FOSTER.”

This letter was proved by the attesting witness thereto, and it was also proved that it was delivered to Mr. Cooper soon after it was written, in whose possession it had since remained, and to whom the defendant had since paid interest upon said debt; and it was also proved, that at one time the defendant offered to pay the principal sum due to the intestate.

The plaintiff's case having closed, the defendant's Counsel called upon the learned Judge to nonsuit the plaintiff, upon two grounds—first, that the letter was insufficient to sustain the action, either as a collateral or an original undertaking; secondly, upon the ground of variance between the contract laid in the declaration and that proved at the trial; but the learned Judge declined so to do, but took a note of the objections, and reserved liberty to the defendant to move to have a nonsuit entered in case the Jury found a verdict for the plaintiff. The Jury found a verdict for the plaintiff.

A rule nisi was obtained in Trinity Term 1841 to set aside this verdict and have a nonsuit entered, upon the grounds relied on at the trial; against which

Mr. *Holmes* and Mr. *Tomb*, Q. C., now shewed cause, and contended that the letter amounted to a good contract in Law, either as an original or collateral undertaking. Although the letter passed between the father and son originally, it enures to the benefit of Cooper: *Walton v. Dodson* (a); and Cooper, by accepting of it, and acting upon it, treating the son as his debtor, and receiving interest upon the debt from him, extinguished the debt as between Cooper and the father. It is, therefore, an original contract and undertaking by the defendant to pay this debt. *Wilson v. Coupland* (b); *Tatlock v. Harris* (c); *Goodman v. Chase* (d). If it be not an original contract by the defendant, but a collateral undertaking on his part to pay this debt, it is clearly sufficient. *Emmott v.*

(a) 3 C. & P. 162.

(b) 5 B. & Ald. 228.

(c) 3 T. R. 180.

(d) 1 B. & Ald. 297.

H. T. 1842. *Kearns (a)*; *Newberry v. Armstrong (b)*. With respect to the objection that the letter is not signed by Cooper, it is only necessary that it should be signed by the party to be charged, in order to make him liable. *Palmer v. Scott (c)*; *Seaton v. Slade (d)*. Considering this as an original contract, the plaintiff is entitled to recover upon the money counts alone, the defendant having admitted the debt and offered to pay the amount of it.

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Mr. *Monahan*, Q. C., and Mr. *Macdonagh*, for the defendant.

This was a mere contract between the father and son, of which a stranger cannot take advantage, nor could a creditor, as Cooper was, avail himself of; *Garrard v. Lord Lauderdale (e)*; and the case of *Walton v. Dodson*, is not an authority in the present case; for, in that case, the document shewed on the face of it that it was a contract between the parties. If the letter is to be regarded as a collateral undertaking, then it is insufficient in not shewing upon the face of it a consideration for that contract. The plaintiff relies upon forbearance to sue, but there is no averment stating the time for which that forbearance was to be; if for ever, that would amount to a release, and should have been proved. There are several authorities against this branch of the plaintiff's case; *James v. Williams (f)*; *Cole v. Dyer (g)*; *Clancy v. Pigott (h)*; *Bewley v. Whiteford (i)*. As to the counts relying upon the release by Cooper to the defendant's father, and the promise and offer by Cooper to execute such release; in the first place, no such offer was proved; and, secondly, to be sufficient, a release under seal ought to have been pleaded and given in evidence; *Leneret v. Rivet (k)*; *Thornton v. Kemp (l)*; *Austin v. Jervoyse (m)*; *Drewe v. Slowly (n)*.

PENNEFATHER, C. J.

After stating that the declaration contained four special counts besides the money counts, his Lordship said—The questions in the case should be determined upon the former, as the Court was of opinion that the plaintiff could not recover on the money counts.—[His Lordship then stated the averments in the several counts, and the leading facts in the case.]—The case has been argued by the plaintiff's Counsel in two ways; first, they have contended that the defendant's letter amounted to a good

(a) 5 Bing. N. C. 559; S. C. 7 Scott, 687.

(b) 4 C. & P. 59; S. C. Moo. & M. 389; 6 Bing. 20, and 3 Moo. & P. 509.

(c) 1 Russ. & M. 391.

(d) 7 Ves. 254.

(e) 3 Sim. 1.

(f) 5 B. & Ad. 1109; S. C. 3 Nev. & M. 196.

(g) 1 Tyrw. 304; S. C. 1 Cr. & Jer. 461.

(h) 2 Ad. & E. 473; S. C. 4 Nev. & M. 496.

(i) Hayes, 356.

(k) Cro. Jac. 503.

(l) Cro. Eliz. 477.

(m) Hob. 69.

(n) Keb. 872.

and sufficient undertaking to pay this debt of his father's ; and, secondly, that viewing the whole transaction of the 11th of March, and the subsequent acceptance of the defendant's letter by Cooper, that this amounted to an original contract on the part of the defendant to pay this debt, and to substitute himself for his father. We are of opinion that in either point of view the plaintiff has failed to establish his case. The first and second counts of the declaration rely upon forbearance as the consideration to support them ; and they do not state the time during which that forbearance is to continue. With respect to the third and fourth counts ; if Cooper's debt had not been omitted in the schedule to the deed, it would have been executed at once, and the plaintiff or any other creditor would not have had any remedy upon it against the defendant. Does the letter, then, do any thing more than what the insertion of this debt in the schedule would have done ? It was plainly only intended to remedy the omission that had occurred in the deed ; and we do not think that the acceptance of this letter by Cooper, had the effect contended for by the plaintiff's Counsel, or that there has been any evidence given that Cooper agreed to discharge the father, or accept the defendant as a substituted security for him. If that were the case, it might be asked why was not the father's bond delivered up and cancelled ? In the view which we have taken of this case, therefore, we are of opinion that this action cannot be sustained : and that whether the contract by the defendant which has been relied on, be considered an original or a collateral contract, that the present action, founded upon that contract, must fail. If it be regarded as a collateral contract, there is no sufficient consideration apparent upon the face of the instrument to support it ; and if it be regarded as an original undertaking, whereby the father was to be wholly discharged from the debt, then no such contract has been proved in this case ; for, a release under seal by Cooper to the father, or an offer to execute such release, should have been proved. Upon these grounds, we are all of opinion, that the defendant is entitled to have a nonsuit entered in this case.

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Rule for nonsuit absolute.

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RICHARD JONES in Error *v.* THE QUEEN.*

Jan. 21, 22, 28.

Where a statute, passed the 24th of August 1839, declared that from and after the 1st of September 1839, any and every Society established at the passing of the Act, of the nature therein described, and then proceeded—"That is to say, any and every Society so constituted that the members thereof may or shall communicate

with or be known to each other by, or may use for the purpose of being known *as such*, any secret sign or signs, password or passwords," &c. :—and the indictment under this statute stated, that "before the 24th of August 1839, there was established in Ireland, to wit, &c., a Society so constituted, that the members thereof *did* communicate with and were known to each other by secret signs and passwords; and that the *said Society so established* previous to the 24th of August, and from thence until and at the time of the commission of the said offence hereinafter, &c.; and the said Society has not yet been dissolved or put an end to: and that Richard Jones before the 24th of August was a member of the said Society, and being such member of the said Society, did after the 1st of September 1839, act as a member of the said Society, and did then and there commit the offence of unlawful combination and confederacy;" against the peace, &c., and contrary to the form of the statutes, &c. To this indictment the defendant having pleaded not guilty, he was tried and convicted, and a writ of error was brought upon the ground that the words "*as such*" in the statute were omitted in the indictment, and that it was not sufficiently shewn in the indictment that the Society which existed previous to the 24th of August 1839, continued to exist so illegally constituted after the 1st of September 1839; *Held*, that after verdict these objections could not be sustained. *Quære*—Would the latter objection be good on demurrer?

The test, that an indictment is bad, if the facts stated in it may be true, and yet the prisoner innocent, is not invariably true.

This Court will abide by the established rule in criminal cases in this country to give the Counsel for the Crown the right of reply although the practice in England is otherwise, the party who opens being there held entitled to the reply.

* For the enactment under which the indictment in this case was framed, see *Regina v. Houston*, 3 Ir. Law Rep. 445: see also *Brady v. The Queen*, 4 Ir. Law Rep. 21, where nearly the same questions as in this case were raised and discussed. That case is so very fully reported, that it has been deemed sufficient to give a mere outline in the present report both of the able arguments of Counsel, and of the elaborate judgments of the Court.

“ after the said 24th day of August, in the year aforesaid, and from
 “ thence until and at the time of the offence hereinafter next men-
 “ tioned; and the said Society has not yet been dissolved or put an end
 “ to; and the Jurors aforesaid, upon their oaths aforesaid, do further
 “ say and present, that Richard Jones, late of the parish of St. Michan
 “ aforesaid, in the county of the city of Dubin, before and on the said
 “ 24th day of August, in the third year of the reign aforesaid, to wit, at
 “ the parish of St. Michan aforesaid, in the county of the City of Dublin
 “ aforesaid, was a member of said Society; and the Jurors aforesaid,
 “ upon their oaths aforesaid, do further say and present, that the said
 “ Richard Jones, being an evil-disposed person, and not regarding the
 “ laws and statutes of this realm, but wilfully, maliciously, and unlawfully
 “ contriving and intending to bring the same into disrepute, and being
 “ such member of the said Society, did, after the 1st day of September,
 “ in the said third year of the reign aforesaid, to wit, on the said 1st day of
 “ October, in the third year of the reign aforesaid, to wit, at the parish
 “ of St. Michan, aforesaid, in the county of the city of Dublin, aforesaid,
 “ act as a member of the said Society; and so the Jurors, aforesaid, upon
 “ their oaths, aforesaid, do say and present that the said Richard Jones
 “ did then and there commit the offence of an unlawful combination and
 “ confederacy; against the peace of our said Lady the Queen, her Crown
 “ and dignity, and contrary to the form of the statutes in that case made
 “ and provided.” The other twenty-one counts in the indictment varied
 the statement of the offence, but it is unnecessary to give them, as the
 errors assigned are applicable to all the counts in the indictment. The
 errors assigned were precisely similar to those assigned in the case of
Brady v. The Queen (a).

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Mr. Napier, and Mr. J. A. Curran, in support of the writ of error,
 contended that the indictment ought to shew not only the establishment
 of a Society so constituted, that the members thereof communicated, and
 were known to each other *as such*, by secret signs and passwords, but,
 also, that such Society did continue so illegally constituted after the 1st of
 September 1839; and that this indictment was defective in these respects.
 The indictment ought to follow the words of the statute strictly, and
 in this case should not have omitted the words “as such,” in the statute;
 3 *Inst.* 41; 2 *Hawk. P. C.* 354, c. 10, s. 110. 1 *Stark. Cr. Pl.* 206;
Regina v. Norton (b), and *Regina v. Page (c)*. In this case, consistently
 with all the allegations in the indictment, the prisoner might be innocent;
 for it is not shewn that this illegal Society continued so illegally con-
 stituted after the 1st of September 1839; and upon this ground, also,

(a) 4 Ir. Law. Rep. 21; S. C. 2 J. & S. 647. (b) 8 C. & P. 196.
 (c) 8 C. & P. 122.

H. T. 1842. the indictment is bad; *Com. Dig. T. Indict. G. 3, note g*; *Rex. Queen's Bench. v. Cheere* (a); *Regina v. Peck* (b). This was helped in *Brady v. The Queen* (c), by an averment that such Society did then still exist, the members whereof "might and did communicate with, and were known to each other, by certain secret signs and passwords."

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Mr. *Monahan*, Q. C., and Mr. *Martley*, Q. C., contended, first, that if any words in the statute were omitted, it must be shewn that they were essential to constitute the offence charged, in order to make their omission a good ground of error; and, secondly, that no words were omitted, but that the words of the statute were precisely followed, as the words "as such" must necessarily be read as applying to the last member of the sentence in which they occur. The second objection was overruled in *Brady v. The Queen*, upon the ground that the statement of the continuance of the Society necessarily implies its continuance with all its illegal characteristics, otherwise it would be a different Society; and that averment is contained in the indictment. The omission of the word "might" in this indictment cannot make any difference, as it is necessarily included in the word "did" in the present indictment; and the words "said Society," in this part of the indictment, necessarily refer to the Society described in the previous part, as existing before the 24th of August.

PENNEFATHER, C. J.

With respect to the objection founded upon the omission of the words "as such" in this indictment, we think that has been sufficiently answered by the Counsel for the Crown, by saying that the sentence in which it occurs creates two offences, and that these words only apply to the last member of that sentence in which it is found. The case of *Brady v. The Queen* is an authority against this objection; and the case of *The Queen v. Page*, and *The Queen v. Norton* were both cases in which the objection was taken before verdict, and these cases were also very different from the present. With respect to the second objection, we are of opinion that the averment in this indictment is sufficient. The objection is, that it is not sufficiently averred that the Society described in the indictment as existing before the 24th of August, did continue so illegally constituted after the 1st of September 1839; but we think the necessary intendment of the indictment is, that the Society which existed before the 24th of August did continue to exist so illegally constituted after the 1st of September 1839. Upon these grounds, therefore, I am of opinion that the errors to this indictment must be overruled.

(a) 4 B. & C. 902.

(b) 6 Ad. & E. 686.

(c) 4 Ir. Law Rep. 21; S. C. 2 Jebb & S. 647.

BURTON, J.,

Concurred in the judgment of the Court, although he entertained considerable doubts upon the second objection for some time. His Lordship added, that if the objection had come before the Court upon demurrer to the indictment, he should have been disposed to consider it as a very serious objection; but that as it had been assigned as error after verdict, the Court should intend that the Society continued so illegally constituted, as it had been described in the indictment to be previous to the 24th of August; and that for this reason the objection could not now prevail.

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Also concurred; and as to the first objection said, it arose from a mis-reading of the statute, and that the words "as such," taken grammatically, only applied to the last member of the sentence in which they were found. As to the second objection, he was also clearly of opinion, that it could not prevail; that the continuance of the *said Society*, so established, necessarily meant, a Society with all the illegal characteristics of the Society described in the previous part of the indictment. The test, that if a possible case of innocence may exist, although all the averments in the indictment are admitted, the indictment will be bad, is not universally true. Many cases might be shewn, in which it would be fallacious; and if a freemason were indicted under this Act, there would be a plain example of its incorrectness. These objections are taken after verdict, and in my mind the 9 G. 4. c. 54. s. 22, applies directly to the case, and if the objections were even more important than they are, I think they would be cured by verdict.

PERRIN, J., having been absent from the argument, declined to express any opinion upon the case.

Judgment affirmed.

Before the argument was commenced in this case, Mr. *Napier* said it would be desirable to determine the order in which the Counsel should be heard, and which party would have the right of reply. In the case of *Brady v. The Queen* (a), he insisted upon his right to the reply, and then shewed by several English cases, that in England, the party who opened was always held entitled to the reply; but the Court in that case said that the old practice should be then adhered to, as all persons had come into Court, and the argument had been proceeded with, under the

(a) 4 Ir. Law Rep. 27.

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impression that the practice which had prevailed in this country, should be followed in that case. The Court, at the same time, said that the question would be considered with a view of adopting for the future the English practice, if it should appear desirable to do so. For these reasons he wished to have the question settled before the argument in this case was commenced.

PENNEFATHER, C. J. said, that the practice had been invariable in this country to give the Crown the right to reply; it had been so expressly ruled in *O'Grady v. The King* (a), and he did not see any good reason for altering a practice which had so long prevailed. The fact, that a different practice prevailed in England, was not sufficient, and we must therefore abide by the established practice, and allow to the Counsel for the Crown the right of reply.

(a) Greene's Report, 20.

Jan. 27.

M'LAIN v. ENERY.

A Commission issued to examine witnesses under the 3 & 4 Vic. c. 105, s. 69, for the trial of an issue out of Chancery, where it appeared that the witnesses would not be able to attend before a Jury; but the examination was directed to be taken *vivâ voce*.

MR. BREWSTER, Q. C., moved that a commission should issue to examine certain witnesses, whose testimony would be required upon the trial of an issue directed by the Court of Chancery in this case to be tried in this Court. The application was made under the 69th section of the 3 & 4 Vic. c. 105,* and was grounded upon the affidavit of the plaintiff's Solicitor, who therein stated that in June 1841, he attended in the county of Cavan upon an examination of witnesses under a commission issued out of the Court of Chancery in this cause, for the purpose of examining certain aged witnesses *de bene esse*. The affidavit then named three witnesses, one of whom was over ninety years of age, and was bed-ridden at the time of that examination; and the other two were over eighty years of age, and unable to leave their homes; and that deponent believed they were at the time of this application more infirm than at the time of the previous examination; and that their evidence was necessary upon the trial of this issue. This affidavit was corroborated by the affidavit of a medical gentleman. The affidavits on the other side did not

* This section enacts—That it shall be lawful for the Courts, &c., upon the application of any of the parties, “to order the examination on oath, upon interrogatories or otherwise, before the Prothonotary or Clerk of the Pleas respectively of the said Court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending,” &c.

displace the facts stated in this affidavit, but alleged that the application was made for the purpose of delay. Upon these facts, Counsel contended that he was entitled to have his motion granted.

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Mr. *Gilmore*, Q. C., Mr. *Major*, Q. C., with whom was Mr. *Wall*, contended that this application was made for delay, and also for the purpose of defeating the very object which the Court of Chancery had in view in directing the issue; namely, that the suspicious testimony of these witnesses might be tested by a *vivâ voce* examination before a Jury. This was the first application made in this country under the recent statute, and the Court will be very cautious in yielding to it; in England, where a similar enactment has been for years in existence, the Courts are most reluctant to grant such application: that is fully shewn in the cases of *Abraham v. Newton* (a); *Davies v. Lowndes* (b). It is not stated in the affidavit that these parties did not attend away from home for the purpose of being examined; and we state that the application is made for delay, while they do not, as they were bound to do in an application of this kind, deny that it was made for delay. In every application of this nature, the affidavit ought to contain such denial.

Mr. *Brewster*, Q. C., replied, and contended that it would be a denial of justice to refuse this application; and it has been decided that it is not necessary to negative delay; *Baddeley v. Gilmore* (c).

BURTON, J.

Upon the facts relied on in the affidavit in support of this motion, we are of opinion that it ought to be complied with; and it is quite unnecessary in the present case to consider how far the Court ought to go in yielding to applications of this nature, for the facts in this case clearly warrant us in granting the commission. As to one of the witnesses, it is perfectly manifest that he is unable to attend before a Jury; and the same may be collected with respect to the other two, from the affidavits in support of the motion, one of which has been made by a medical gentleman; and there is no affidavit upon the other side negating the statements in these affidavits. Under these circumstances, we are of opinion that the motion ought to be granted.

Mr. *Major* then applied that the examination should be *vivâ voce*, so that his client might have an opportunity of cross-examining these witnesses; which was, after some discussion, considered fair, and the order was accordingly made in that way.

Motion granted.

(a) 8 Bing. 274.

(b) 6 Scott, 738.

(c) 1 Mees. & W. 55.

E. T. 1842.
Queen's Bench.

April 16.

IRWIN v. STAUNTON.*

The Court refused to discharge a defendant in arrest under a *ca. sa.*, out of custody, although the plaintiff omitted to lodge with the Sheriff, at the time of issuing the execution, a certificate of the sum due, according to the provisions of the 6 *Anne*, c. 7; but the plaintiff was put under terms to enter an appearance to an action to be brought on this statute by the defendant, the former being at the time resident out of the jurisdiction.

On a former day a conditional order had been obtained, that the defendant in this cause, who had been arrested under a *capias ad satisfaciendum*, should be discharged from custody, on the ground that the same had been irregularly issued, the provisions of the statute 6th *Anne*, c. 7, not having been complied with;† or that the plaintiff might be compelled to enter an appearance to an action on the case, brought by the defendant on such statute, plaintiff being resident out of the jurisdiction.

Mr. *James Dwyer* now applied to have this order made absolute. In this case the provisions of the statute 6th *Anne*, c. 7, have not been complied with; that statute enacts, that the party at whose suit any execution issues, shall, at the time of the issuing thereof, lodge with the Sheriff a certificate containing a statement of the sum claimed to be due to the plaintiff; this the plaintiff has omitted to do; the defendant is, therefore, entitled to his discharge, and to have the execution set aside for this omission. The certificate is the only means by which the Sheriff is enabled to ascertain the fees he is entitled to; the 2nd section directs that the Sheriff, demanding or receiving fees for more than appears due by such certificate, should be liable to an action for treble damages; and the 3rd section goes on to state the fees that are to be charged on

* *Coram* Burton, J., and Crampton, J.

† 6 *Anne*, c. 7, s. 1.—After reciting that Sheriffs and other Officers usually demanded great and excessive fees on executions, *elegits*, &c., enacted, “That no Sheriff or other Officer having execution of writs shall, after the 6th of November 1707, receive or demand fees for executions either on judgments, statutes, or otherwise, for more than what the party at whose suit the execution issues, or his, or her or their Attorney or Agent shall, under his or her hand, certify to be justly due to him or her thereon; and that at the time any writ of execution shall be demanded or called for in any office in this kingdom whence such execution is to issue, the party demanding the same shall lodge with the Officer a writing or certificate, under the hand of the party or parties for whom such execution is demanded, or of his Attorney, containing such sum as the party at whose suit such execution shall issue, demands and insists on to be in good conscience due to him, after all equitable deductions that ought to be made out of the sum for which the said judgment is given; which certificate shall be filed in the said office, and the sum therein contained shall be entered in the book where the executions are entered, and also on foot of the writ of execution that shall issue.” It then states the amount of fees payable on such executions, &c.

Section 2.—“That in case on any such execution the Sheriff, or any other Officer having executions of writs as aforesaid, shall, after the said 6th of November 1707,

executions, that the amount thereof is to be ascertained by the certificate, clearly shewing that this certificate is requisite, and that unless lodged with the Sheriff, the provisions of the Act cannot be carried into effect. It is impossible to get rid of the words of the statute; they are precise and specific. If the Court will set aside an execution under a *fi. fa.* or *ca. sa.* for not having indorsed thereon the place of abode and addition of the party, in pursuance of the 43rd General Rule, *Hunter v. Reddy (a)*; *Harrison v. Hanly (b)*; much more will they feel themselves bound to follow the directions of an Act of Parliament. A penalty being given by the statute, that implies a prohibition, and the thing is unlawful though there be no prohibitory words in the statute; *Dwarris on Stat. (c)*; therefore, the Court is bound to set aside this execution.

This Act is not alone conversant with fees; it also refers to overmarking executions, and treats of executions generally, and the provisions of it should be strictly followed. The notice of this motion is in the alternative; the plaintiff being out of the jurisdiction, if he consents to enter an appearance to an action to be brought on this statute, we will not insist upon the defendant's right to be discharged.

Mr. Rogers, contra.—We have performed all the requisites of the Act except lodging the certificate; the sum was marked on foot of the writ, which is a sufficient compliance with the Act, and there is no necessity on lodging the execution to give a certificate, the amount being sufficiently ascertained by the writ. It has never been the practice of the Officer to require such certificate to be lodged. This Act is not very distinctly worded: where there is any ambiguity in an Act of Parliament, the practice of the office is important. In *Lessee Nagle v. Ahern (d)*, Pennefather B. says—"It is true, that usage cannot alter or control the construction of an Act of Parliament, where the language

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(a) 3 Ir. Law Rep. 106.

(c) p. 678.

(b) 3 Ir. Law Rep. 137.

(d) 3 Ir. Law Rep. 45.

"demand or receive fees for more than appears to be due by such certificate, that such Sheriff or Under Officer shall be liable to the action or suit of the party against whom such execution issues, and shall forfeit and answer to the said party, his, her or their double damages; and that if the party or parties at whose suit such execution shall issue, or his, her or their Attorney or Agent, shall neglect or omit to deliver an attested copy as aforesaid of such certificate, together with such writs of execution, or shall appear wilfully, fraudulently or maliciously to have overcharged the party against whom such execution issues, in such certificate given in or made by them, that the party at whose suit such execution issues shall, as aforesaid, forfeit and answer to the party grieved, his, her or their treble damages; which said execution shall be marked with the sum contained in the said certificate by the proper Officer issuing such execution."

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"is clear and unambiguous, but when its meaning is doubtful, usage is a matter to be taken into account, to aid the Court in arriving at the true construction."

There is no positive direction in the statute that such certificate should be given ; it merely enacts, that if the party shall neglect to lodge an attested copy of such certificate, he will be liable to an action for treble damages ; the defendant, therefore, if he feels himself aggrieved, has his remedy by proceeding for the penalties, but he has no right on motion to claim to be discharged. As to the alternative part of the notice, it is enough to state that the defendant has brought an action in England for the penalties given by this Act ; and as the action is still pending, the plaintiff should not be harrassed with two actions, and compelled to enter an appearance to a writ in this country.

*Per Curiam.**

We think it reasonable that the plaintiff should enter an appearance in this country, on the terms that the proceedings in England be discontinued ; but as a penalty is given by the Act, and as there is no positive direction that the party should lodge the certificate, we think the defendant is not entitled to be discharged.

Let the motion be refused with costs ; the plaintiff to enter an appearance to a writ to be issued against him by the defendant, in an action to be brought against plaintiff for not delivering to the Sheriff an attested copy of a certificate, as mentioned in the 6th *Anne*, c. 7, and for overmarking said execution ; and the defendant undertaking to discontinue an action brought by him in England against the plaintiff.

Absentibus Pennefather, C. J., and Perrin, J.

E. T. 1842.
Queen's Bench.

REGINA v. BYRNE.

April 16.

A CONDITIONAL order had been obtained in last Michaelmas Term, for an information in the nature of a *quo warranto*, against the defendant, for claiming to hold the office of Town Councillor of the City of Dublin, on the ground that he was not duly elected as such Town Councillor, and that James Ferrier was legally elected, and should have been returned such Town Councillor.

The affidavit of Nicholas Moore, the relator, made in support of this order, stated, that at the election held for the appointing of Aldermen and Town Councillors for the City of Dublin, the defendant Byrne, and James Ferrier, were candidates for the said office, and that at the close of said election, the defendant Byrne had a nominal majority of one vote over the said James Ferrier. That the said defendant was thereupon declared duly elected as such Town Councillor, and that he had taken upon himself the said office, and had continued to act in that capacity. The affidavit averred, that four of the votes which had been taken for the defendant, were not given by the voters in whose names they were tendered, and that those votes were fictitious and bad.

The affidavits on the other side admitted those several cases of personation, but alleged that a greater number of fictitious votes were tendered and received on behalf of Ferrier, and that if the four illegal votes were struck off defendant Byrne's poll, he, the said defendant, would still have the majority of legal votes.

Mr. *Brewster*, Q. C., with whom was Mr. *J. F. Waller*, now moved, that notwithstanding such affidavit, the conditional order be made absolute. The question between the parties is, whether the defendant can, as cause against this conditional order, shew, that improper votes have been given on the other side, but this has been decided by the *Queen v. Quayle* (a). It was there held, that such an objection was no answer to a motion for a *quo warranto*, on the plain principle, that a party should not lose his qualification, who had not been objected to on the occasion of tendering his vote, when he had the opportunity of answering the objection.

Mr. *Monahan*, Q. C., with whom were Mr. *O'Callaghan* and Mr. *Dillon*, yielded to the authority of *Rex v. Quayle*, upon the present motion,

(a) 11 Ad. & E. 508.

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but said, that case established that they could take advantage of this defence in their pleas.

*Per Curiam.**

Upon the authority of the case cited by Mr. Brewster, the order must be made absolute; this Court cannot upon motion enter into a scrutiny of votes.

Rule absolute.

* *Coram* Burton, J. and Crampton, J.

LENEHAN v. EARL OF BANTRY.

April 19.

An affidavit of merits made in support of a motion to set aside a judgment, should state positively that there is a good cause of defence; if the judgment be entered irregularly or *malâ fide* no affidavit of merits is necessary.

MR. O'HEA applied that the judgment obtained in this cause should be set aside, upon the ground that it had been obtained by surprise, having been marked pending an arbitration; the judgment had been marked for want of pleas in bar in an action of replevin. Negotiations had gone so far as the nomination of arbitrators; the affidavit made by the party in support of this motion, states that he is advised and believes he has a good cause of defence.

Mr. *Brereton*, *contra*, objected to the sufficiency of this affidavit: the party should swear positively he has a good cause of defence.

BURTON, J.

Generally speaking this affidavit is not sufficient; as to merits he should swear positively, otherwise the objection would be fatal; if the judgment be regular, an affidavit of merits is necessary, but if it appear that it was irregular, or entered *malâ fide*, the party may set aside the judgment without an affidavit of merits; in this case the affidavit states surprise, that is sufficient ground for a conditional order.

Motion granted.

E. T. 1842.
Queen's Bench.

ANONYMOUS.

April 22.

MR. CHAMBERS applied that service of a *capias ad respondendum* be deemed good service. The affidavit of the process-server stated, that the defendant was a prisoner in the Sheriffs' prison, and that he went there for the purpose of serving him with a writ, but was afraid to go into the prison, as his life would be in danger, and that he delivered the writ to the Hatchman and desired him to give it to the defendant.

Service of a writ on the Hatchman of the Sheriffs' prison, will not be deemed good service on a prisoner.

CRAMPTON, J.

An order was made here, some Terms since, that service of a writ in any of the Dublin gaols should be on the Governor, but I will give you an order to substitute service by serving the Governor of the gaol.*

* In *Dillon v. Magrath*, April 28th, Perrin, J., made an order that service of a writ on the Governor should be deemed good service.

FULTON, assignee of St. QUENTIN

v.

CREAGH.

April 21.

MR. WALTER H. GRIFFITH, with whom was Mr. *Collins*, Q. C., applied on the part of the defendant in this cause, that the record of the judgment obtained on a *scire facias*, which had issued against the defendant, might be amended. The *scire facias* had been sued out in Hilary Term 1841, and the defendant had pleaded thereto several pleas, amongst others, a plea of *nul tiel record* of the assignment of the judgment; the pleas were filed on the 12th of May 1841, and the plaintiff joined issue on the plea of *nul tiel record*, and in the following Trinity Term the record was inspected and judgment given for the plaintiff. The amendment sought was, that the memorial of the assignment of the judgment should be set out *verbatim* on the record, instead of being in its present form, which merely stated, that a memorial of the assignment had been inspected, without setting out the contents of the memorial. A writ of error had been brought upon this judgment into the Exchequer Chamber, and the errors assigned arose from alleged defects in this memorial;

The Court refused to amend the record of a judgment obtained upon a *scire facias* sued out in Hilary Term 1841, and to which the defendant pleaded *nul tiel record*, which plea was overruled in Trinity Term 1841; the amendment sought being to have the memorial of the assignment of the judgment set out.

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and, therefore, unless the amendment be allowed, we will be precluded from proceeding on our writ of error; *Mellish v. Richardson* (a). We could not have stated this memorial in our pleas, but the plaintiff should have set it out in his replication; *Richardson v. Tomkies* (b). We merely seek to have this judgment put in a train to be reviewed, and we cannot proceed with our writ of error unless we allege diminution, and diminution cannot be alleged contrary to the record (c).

Mr. J. Brooke, Q. C., with whom was Mr. Napier, *contra*.

What is sought for on the other side is not an amendment: the judgment is perfectly regular, and according to the established precedents. *Archb. Pr.* 457. But even if the judgment were wrong, the defendant is not entitled to this amendment: he should have set out the defects as error before the Court above. This application is brought merely for delay, and contrary to the merits; and, considering the length of time that has elapsed since the entry of this judgment, the Court should be slow to allow such a motion as the present, as it will not tend to the furtherance of justice. *Roddy v. Clements* (d). But even supposing the Court were willing to allow this amendment, notwithstanding the length of time that has elapsed, they have no power to do so. *Rex v. Carlisle* (e); in which the case of *Mellish v. Richardson*, referred to on the other side, was cited, and there the amendment was refused, although the consent of the Attorney-General had been obtained.

Mr. Collins, Q. C., in reply.—The case of *The King v. Carlisle* does not apply to the present case: that was a criminal case, and an application to re-hear a judgment.

BURTON, J.

We certainly have the power to direct this amendment, if we think right so to do; but the party had full opportunity of putting this matter upon the record, if the application for that purpose had been made in proper time. It is not necessary now to consider whether the defendant should have set it out in his pleading; but this is certain, if he had applied to the Court in proper time, and given a good reason to have it put upon the record, the Court might have done then what is now sought to have done by amendment. This writ of error may have been brought for delay, for all we know to the contrary; for, after a lapse of several Terms, an application is brought without any affidavit of merits. The Court, in a case of this kind, has a discretion which, under the

(a) 7 B. & C. 819.

(c) Tidd, 714, 1167.

(b) 9 Bing. 51.

(d) 2 Ir. Law Rep. 233.

(e) 2 B. & Ad. 971.

circumstances of the present case, it will not exercise in favour of the defendant, as it does not seem likely that the exercise of that discretion, as sought for in this particular case, would be calculated to advance the interests of justice. We are therefore of opinion this motion must be refused, with costs.

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CRAMPTON, J.

I should be extremely slow to make a precedent, by yielding to the application in this case and making an amendment such as is called for here. It would be a departure from the uniform practice of the Court, and would not be advantageous for the ends of justice. If the Court were called upon in favour of a party who required to be relieved from a fatality, the case would be different; but here, after a length of time has elapsed, and every thing ready to send the case for argument to the Court of Error, the party makes his application. This is not, therefore, a motion which, if granted, would be for the advancement of justice, nor such as, under the circumstances, the Court is called upon to go out of its ordinary course to consent to.

PERRIN, J.

The Court has undoubtedly the power to amend this judgment after the Term in which it was entered. There are several cases where the record has been sent back to have the judgment amended; but this is not an application to amend a judgment, but to alter the established forms of the Court, which, if conceded, would not, in my opinion, advance justice.

Motion refused, with costs.

EDWARD HICKEY

v.

JOHN BROWNE and JEREMIAH HANLEY.

April 25.

ASSUMPSIT.—This was an action of assumpsit on a special contract, tried at the last Summer Assizes for the county of Cork, before Mr. Sergeant Greene. Plea—general issue. It appeared from the evidence that the

In an action of special assumpsit upon the following contract, "I

propose to superintend the execution and building of the B. Workhouse, and to devote my entire attention to it, for the sum of £2 per week. Signed, A. B."—Held, that this appearing to be a contract not exceeding £20 in value, did not require a stamp. Secondly, that it was a continuing contract, and could not be put an end to without notice.

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plaintiff had undertaken to superintend the building of the Bandon Workhouse, and that a proposal, in the following terms, had been made by the plaintiff:—

“I propose to superintend the execution and building of the Bandon Workhouse, and to devote my entire attention to it, for the sum of £2 a-week. (Signed) EDWARD HICKEY.”

The defendants (who had contracted with the Guardians for the building of the workhouse) accepted this proposal, and the plaintiff continued in the superintendence of the building for some time, until he was removed from the situation without any previous notice, and before the building had been completed. No misconduct or neglect of duty was imputed to the plaintiff. Counsel for the defendants objected to the proposal being received in evidence, on the ground that it was not stamped; and they also contended that it was only a weekly contract, and that the defendants had a right to put an end to it at the expiration of a week, without any notice. The learned Judge admitted the proposal to be given in evidence, subject to the objections; and told the Jury that he thought the contract was, that the defendants should employ the plaintiff during the continuance of the work, or, at least, so long as a superintendent might be necessary, and that the defendants had no right, without notice, to determine this contract, unless the plaintiff had been guilty of neglecting their interests or his duty. The Jury found a verdict for the plaintiff.

On a former day, a conditional order had been obtained to have this verdict set aside, and that a nonsuit or verdict should be entered for the defendant, pursuant to the leave reserved at the trial.

Mr. *Bennett*, Q. C., with whom was Mr. *O'Hea*, now shewed cause.

As to the first objection, that the contract requires a stamp—This is an excepted case under the 56 G. 3, c. 56, in the schedule to which Act it is enacted, “That any agreement or minute or memorandum of an agreement made in Ireland, when the matter thereof shall be of the value of £20 or upwards, whether the same shall contain an actual contract, or be only evidence of a contract, or obligatory on the parties, from its being a written instrument,” requires a £1 stamp; but, “any memorandum or agreement for the hire of any labourer, artificer, manufacturer or menial servant, is exempt from this duty.” The plaintiff comes clearly within this exception, for he was manifestly an artificer: he was a superintendent and a master builder. The meaning of the word “superintendent” is to be collected from the nature of the work, which shews that he was an artificer. But, assuming he does not come within this exception, this contract, not being of the value specified in the Act, does not require a stamp. It should plainly appear, upon the face of the contract, that it was of the value of £20; the amount should be measur-

able by some definite sum appearing upon the contract itself. *Rex v. Inhabitants of Enderby* (a); *Orford v. Cole* (b); *Doe v. Amos* (c); *Warrington v. Warrington* (d); *Chitty on Cont.* (e). It is impossible to determine this would be of the value of £20, for there is nothing in the contract itself by which the value could be ascertained. As to the construction of the contract, upon the face of the document which binds the party proposing it, it is to continue until the work was completed. The plaintiff had no power to determine the contract until the building was finished; and it is not reasonable to suppose he would enter into such an engagement as this, if he could be dismissed without any notice.

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Mr. Collins, Q. C., contra.—This party does not come within the description in the exemption; *Lowther v. Radnor* (f). As to the contract, it is manifestly a contract for a week. Nothing appears to shew that he should be continued in the employment until the work was completely done. In *Rex v. Warminster* (g), it was decided, that a hiring for an indefinite period, at six shillings a-week, is not a yearly hiring. The plaintiff is in this dilemma: this is either a contract to superintend the work from its commencement until its completion—and, if so, it is a contract exceeding £20 in value, and therefore requires a stamp—or it is only an agreement by the week, and may be put an end to at any time within a week. *Chadwick v. Sills* (h); *Mockler on Stamps*, 170.

BURTON, J.

This verdict must be established on both grounds. The contract was a continuing one, and could not be put an end to without notice, unless the party misconducted himself. No proof was given of any misconduct, nor was any notice given. The other proposition is answered by the argument, that the value of the thing contracted for could not be measured; and, therefore, this agreement did not require a stamp.

Allow the cause shewn, with costs.

(a) 2 B. & Ad. 205.

(c) 2 M. & Ry. 181.

(e) p. 115.

(g) 9 D. & Ry. 70.

(b) 2 Stark. 351.

(d) 8 East, 242.

(f) 8 East, 125.

(h) 1 Ry. & M. 16.

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MATHERS v. COYLE and M'DONAGH.

April 28.

In an action against two defendants who had appeared in different Terms, and the declaration had been filed as of the Term in which, and on the day before, the last appearance had been entered; the Court set aside the proceedings for irregularity, plaintiff not having entered a rule for liberty to file the declaration as of the subsequent Term, and having filed the declaration previous to the last appearance.

A party is not bound to notice an irregularity, when he has notice of the proceeding, in reference to which the irregularity is committed, unless such irregularity be apparent on the face of the proceeding.

MR. HATCHELL, Q. C., applied on behalf of the defendant Coyle, that the declaration and subsequent proceedings in this cause should be set aside for irregularity, inasmuch as the appearance for the said defendant Coyle, was entered on the 22nd day of April in Easter Term 1841, and the declaration in this cause appears to have been filed, and the rule to plead entered thereon upon the 5th of November 1841, although no appearance at the time had been entered for the other defendant M'Donagh, said appearance not having been entered until the 16th of November 1841; and, also, because the said declaration is entitled as of Michaelmas Term 1841, without any rule being entered for liberty to declare against the said defendant as of Michaelmas Term 1841, he having appeared in the previous Easter Term.

These proceedings are clearly irregular, no rule having been entered for liberty to declare against the defendant Coyle, as of Michaelmas Term; 1 *Ferguson's Prac.* 220; and the plaintiff was also clearly irregular in filing his declaration against M'Donagh before the latter had entered an appearance. The only question then is as to our being in time with this application. The plaintiff filed his declaration in Michaelmas Term 1841, and having taken out the rule to plead at the same time, chooses to lie by, and does not serve that rule until the 18th of April. We served notice of this motion on the 25th of April; and, therefore, we have not been guilty of laches. For until served with this rule, we were not bound to take notice of the filing of the declaration, as a party shews no intention of proceeding with his action until he serves the rule to plead. It is said that M'Donagh has not complained of this irregularity, and why? Because he is colluding with the plaintiff, and thus they both endeavour to charge Coyle with the entire of this demand.

Mr. Macdonagh, *contra*.—The defendant (M'Donagh) having been discharged as an insolvent debtor, the plaintiff's Attorney thought it was sufficient to serve Coyle alone, and that if Coyle had pleaded in abatement, plaintiff might have replied (under the provisions of the 3 & 4 Vic. c. 105, s. 38) that M'Donagh had been discharged as an insolvent; but the plaintiff having discovered that M'Donagh omitted to return this debt in his schedule, and being advised that for that reason he could not reply his insolvency, was obliged to include him in the declaration. As to the title of declaration, when there are several defendants who appear at different times, the declaration must be entitled as of the Term

in which the last appearance has been entered; *Stork v. Herbert* (a). If there be an irregularity in the entry of the appearance by M'Donagh, it being subsequent to the filing of the declaration, he alone was entitled to complain of such irregularity; but there has been no such irregularity, for the appearance has relation back to the first day of Term. The only objection then, is the absence of the side-bar rule for liberty to file the declaration as of Michaelmas Term, and of this irregularity he cannot now take advantage, after an acquiescence for such a length of time; *Cook v. Allen* (b); *Brashour v. Russell* (c); *Fowel v. Petre* (d); laches may arise either by the party lying by for an unreasonable time, or by his taking a fresh step after notice of the irregularity; when a party has notice of a proceeding having been taken, he is bound with notice of the irregularity from that period; *Esdale v. Davis* (e). In that case Patteson, J. says, "A man is bound to know of every proceeding taken against him, and if there be any error in it, he ought to ascertain that error; he cannot be heard to say he did not know of it." In this case the party had notice of the filing of the declaration in last Michaelmas Term, and has not moved in the matter until now.—[CRAMPTON, J. If this irregularity were on the face of the proceeding, that case would be in point.]—The rule does not apply to irregularities apparent on the face of the proceedings, the party is bound to come to the Court when he knows of the proceeding upon which the irregularity exists, not of the irregularity itself; and he must come within a reasonable time; the ensuing Term has been considered a reasonable time: *Yeo Rules* 41, *Ferguson's Prac.* 1037.

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It would be very unreasonable that a person should be bound to take advantage of an irregularity not patent on the proceedings, and of which he has not actual knowledge; the 24th General Rule is well known; if a party lie by, knowing of the irregularity, and suffer his opponent to take a step, the Court will not assist him. In the case of *Esdale v. Davis*, Patteson, J., says: "What is meant by the rule, that he is bound to come promptly is, that he is bound to come promptly after he knows of the proceeding in which the supposed irregularity exists, and not after he knows of the irregularity itself." Now every *dictum* of a Judge ought to be taken to refer to the facts before him at the time, and ought not to be supposed to refer to other facts; in that case the objection appeared on the face of the proceeding itself, and there is nothing in the judgment of that learned Judge, which differs from our own rule. I think, in accordance with what has been stated in that case, the party was

(a) 1 Wils. 242.

(b) 3 Tyr. 378.

(c) 5 Scott, 268.

(d) 5 D. P. C. 276.

(e) 6 D. P. C. 468.

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bound by every thing that was apparent upon the declaration ; in every proceeding against himself, if there was error in it he was bound to ascertain it, not to say he did not know of it ; so also I should say, that the defendant here was bound to know what was in the declaration, but he was not bound to know that the other defendant had not appeared, for he could not ascertain that from the declaration. If he had taken any step himself, or allowed his opponent to do so, that would have made some difference. As to what is reasonable time, it must be regulated by this consideration—how soon had the party knowledge of the irregularity, or how soon may the Court presume he ought to have had that knowledge? The proceedings in this case stand thus:—a declaration is filed on the 15th of November, on the same day the rule to plead is entered, and notice of the declaration being filed is served ; if at the same time the rule to plead had been served, it might have been a different matter ; but the plaintiff does not serve such rule, and the defendant is charged with delay, although the same degree of blame applies to the plaintiff, and laches ought not, therefore to be visited on the defendant. In this case there was neither actual knowledge nor that species of notice which Judge Patteson refers to, and I am of opinion that this motion must be granted.

PERRIN, J.

It is of great importance that the practice of the Court should be fixed, and the rule requiring parties to come without delay, and without laches, to complain of irregularities like the present, ought to be observed ; but in this case the irregularity was not apparent on the face of the declaration ; and the plaintiff, by not serving the rules to plead, gives some ground for the defendant's supposing he is not going to proceed in the cause. There is a case in *Forrest's Reports* which appears applicable to the present.* In the present case the applicant cannot be charged with laches, he has come forward in due time ; and I am, therefore, of opinion that this motion ought to be allowed.

BURTON, J.

There is a very intelligible distinction between this case and the case decided by Judge Patteson. The rule to plead not having been served, might fairly be considered to amount to an implied declaration, that the plaintiff had not an intention of proceeding further in the action, and that circumstance clearly distinguishes this case from the decision and *dicta* in *Esdaile v. Davis*, and, therefore,—

Allow the motion, but without costs.

* The case referred to by the learned Judge would appear to be the case of *Bal-lentyne v. Wilson*, For. 34, where Macdonald, C.B., stated—"Nobody is bound to notice any irregularity until it affects himself."

E. T. 1841.
Queen's Bench.

Lessee of LORD POWERSCOURT v. BRISLIN.

April 28.

A **CONDITIONAL** order had been obtained in this cause on the part of the defendant, for liberty to file a second declaration in the name of the plaintiff, and to enter up judgment thereon as in case of a nonsuit, the cause having been at issue more than three Terms. The ejectment had been moved on in Easter Term 1841; an appearance was entered and defence taken thereto the same Term, and no further proceedings had since. The affidavit, as cause against this order, stated, that in Hilary Term 1841, an ejectment on the title had been brought for the recovery of certain premises in the county of Wicklow, the estate of Lord Powerscourt, upon which the defendant and several other persons had encroached and settled, many of them within a short period, and during the minority of Lord Powerscourt: that defence had been taken to this ejectment by Mr. Garde, Attorney, in the name of defendant and several others; that the question to be tried against the several defendants was the same, namely, whether the persons who had so encroached and settled upon the lands had acquired a title to their several holdings against Lord Powerscourt; that several of those persons having taken separate defences, in order to save expense, several of those cases were selected for trial, and the defences taken in such cases consolidated, and the record in such consolidated cases was brought down for trial at the Wicklow Summer Assizes of 1841, and the lessors of the plaintiff were fully prepared to proceed with the trial; but that on the special application of the defendants, the trial was postponed to the ensuing Spring Assizes; that notice of trial was served for such Spring Assizes, but, in consequence of the absence of his Counsel, plaintiff was compelled to withdraw such notice of trial. It further stated, that plaintiff intended to proceed to trial at the ensuing Summer Assizes, in case an arrangement between the parties be not effected in the mean time; that a second declaration had not been filed in this cause, in consequence of a verdict not having been obtained in the cases which had been selected, the question in all the cases being the same; and as a verdict in one would be most likely to determine the others, this cause was not further proceeded with in order to avoid the heavy expense of a second record; that these several defendants are paupers, and Lord Powerscourt, in order to avoid the imputation of any harshness towards them, has offered to give them leases of their several holdings at merely nominal rents.

Mr. Hatchell, Q. C., now shewed cause.—According to the old

Where in ejectment on the title against eleven persons, the defences of five of those persons had been consolidated, and plaintiff brought this cause to trial against those five persons, but such trial was postponed, at the instance of the defendants, to the next Assizes, and at the following Assizes plaintiff was unable to go to trial in consequence of the absence of his Counsel, and it was stated that the cases of all the defendants were similar; *Held*, that was sufficient cause against a motion for judgment as in case of nonsuit on behalf of a defendant whose case had not been brought to trial.

This Court adheres to the rule laid down in *Gilman v. Connor* (1 Ir. Law Rep. 346), and requires a plaintiff in shewing cause against a rule nisi for judgment as in case of nonsuit, to shew "just cause" for not having gone to trial; and a peremptory

undertaking or a slight excuse will not be sufficient cause in this Court against making the rule absolute.

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practice, a peremptory undertaking to go to trial was a sufficient answer to this application; but, since the case of *Gilman v. Connor* (a), some excuse must be shewn—a slight excuse is sufficient—there has been no default on our parts for the first six months. We served a notice, tendering a consent to discharge the conditional order, offering to pay the plaintiff the costs of the order, and an undertaking to go to trial at the ensuing Assizes. He cited *Anonymous* (b); *Doe dem. Ringer v. Blois* (c).

Mr. *Berwick*, Q. C., with whom was Mr. *Richard Garde*, *contra*.

The plaintiff has not shewn a just cause for not having gone to trial: on the contrary, he has shewn no cause at all. He has consolidated the defences in five cases, and leaves six others without consolidating or taking any step against them since Easter Term 1841. There has been default on the part of the plaintiff. He should have consolidated his defences and tried all in one action. At the Summer Assizes of 1841, he went to trial against those five persons; and, in consequence of the refusal on the part of the plaintiffs to admit the copy of an Act of Parliament as evidence, the trial was postponed. The affidavit does not state that the defendant was one of the persons who had encroached. His just cause is, that there is a case depending against other persons, which may by possibility decide this. They should shew the decision in that action would affect the defendant. — *v. Worthington* (d). By the words of the statute (e), “just cause” must be shewn; and the case of *Gilman v. Connor* has decided a peremptory undertaking is not sufficient. With regard to the consent, we were compelled to apply to the Court.

Mr. *Hatchell*, Q. C., in reply.—With regard to the Act of Parliament which they called upon us to admit, it was a private Act passed in England upwards of a century since, and they refused to shew it to the plaintiff's Counsel. If the plaintiff had consolidated all the defences, in case he failed, each would be entitled to their separate costs.

Per Curiam.

There has been sufficient cause shewn. We are anxious that it should be understood that we allow the cause shewn in this case, upon the principle that there has been cause shewn to the Court, and not slight cause, but a reasonable ground, for the plaintiff's not going to trial.

Allow the cause shewn, the plaintiff undertaking to pay the costs of the conditional order, and the costs of this motion, and to go to trial at the next Assizes.

(a) 1 Ir. Law Rep. 346.

(b) 2 Ir. Law Rep. 263.

(c) 8 Dow. P. C. 18.

(d) 2 Ir. Law Rep. 266.

(e) 28 G. 3, c. 31.

H. T. 1841.
Common Pleas.

DANIEL, in Replevin, *v.* BINGHAM.

(*Common Pleas.*)

Jan. 28.

THIS was an action of replevin. The defendant put in two avowries, that he had distrained the plaintiff's goods, as landlord, for £120 due for one year and a-half's rent. The plaintiff pleaded two pleas—first, that before, and at the time of the distress, the plaintiff was in possession of a dwelling-house, for the rent of which the distress had been made; and that the defendant did not, *at or before* the time of making the said distress, deliver the particulars required by the 6 & 7 W. 4, c. 75, s. 6. The second plea was similar to the first, with the exception of the plaintiff having stated that the required particulars had not been delivered at all. On this latter plea issue had been taken; and to the former the defendant demurred, and the plaintiff joined in demurrer.

It is not necessary that a landlord distraining for rent should deliver the particulars of distress required by the 6 & 7 W. 4, c. 75, s. 6, unless in cases of distress for rent falling within the jurisdiction of the Civil Bill Courts. *Dis. Foster, J.*

Mr. J. D. Fitzgerald, in support of the demurrer.—To maintain his plea, the plaintiff must, in the first place, maintain that the 6th section of the 6 & 7 W. 4, c. 75, is not confined to cases within the Civil Bill jurisdiction—*i. e.*, to cases in which the rent distrained for does not exceed £50. On the other hand, we contend, that it is wholly confined to that class of cases, and, consequently, does not apply to this case, in which, it is admitted on the record, that the yearly rent is £80, and the rent distrained for £120. This latter construction is confirmed by the title of the Act, which is, "*to extend the jurisdiction, and regulate the proceedings of the Civil Bill Courts in Ireland;*" and also by the preamble, which, although it will not be allowed to control the express words of the Act, is, nevertheless, a good key for opening the meaning of the Legislature where it is doubtful—4 *Inst.* 330; *Ryan v. Rolle* (a); *Mason v. Armitage* (b). The provisions of the 5th section are expressly confined to cases of distress where the rent does not exceed £50, giving the Assistant Barrister power to hear and determine such cases; and the 6th section following immediately, without the intervening words of "*be it further enacted,*" should be read as part and continuance of the preceding section, and be therefore limited to cases within the Civil Bill jurisdiction. The 7th section empowers the Sheriffs to appoint replevinders; and the conclusion of it, which refers to the second schedule of the Act, in which it will be found that fees are allowed for the execution of the replevin bond, which bond is conditioned to prosecute the replevin suit in the Civil Bill Court, shews that this section also

(a) 1 Atk. 174.

(b) 13 Ves. 36.

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applies to the Civil Bill jurisdiction. The 8th and 9th sections are likewise confined to cases within the same jurisdiction; while the 10th, which is as general in its terms as the 6th section, is, nevertheless, manifestly confined and restricted in the same manner as the others. Again, passing on to the 19th section, we find a new jurisdiction conferred with respect to personal representatives, in cases where the assets do not exceed £200; and, in the 22nd section, it is provided, in words as extensive as those of the 6th section, that "*every* executor or administrator" may be compelled to produce copies of their respective wills, &c. Now, if the generality of the words in this latter section are to be restricted, by the obvious intent of the preceding enactments, to those cases alone in which the assets amount to a specified sum, in the same manner ought the words of the 6th section to be restricted to the particular class of distresses designated, not only in the immediately preceding, but in the immediately subsequent, sections. Moreover, all the provisions of the Act apply exclusively to the Civil Bill jurisdiction, as appears likewise by the fees and forms given in the schedules which have reference to the Civil Bill Courts alone. In fine, this construction is confirmed by the express authority of *Carden v. Mahon* (a), in which Mr. Justice Crampton is reported to have stated, that it had been decided that the notice in question was only required in cases within the Civil Bill jurisdiction.

Next, supposing that the Court should be of opinion that the provisions of the 6th section are not to be confined to cases within the Civil Bill jurisdiction; it must be contended by the other side, that they are mandatory, and not merely directory. For this position the case of *Murphy in replevin v. Butler* (b), a decision by seven out of ten of the Judges will be relied on. That case was not, however, argued by Counsel.—[DOHERTY, C. J. It may be right for me to say, that although not present at the discussion of that case, I am strongly in favour of the provisions of the section being mandatory. That was, however, a decision on a case which was not argued by Counsel, and now that there is an opportunity of having it argued by Counsel, we will not shut them out by considering it a decision.]—The only argument for its being mandatory is drawn from the word "*shall*;" but that is not sufficient to warrant the conclusion, no condition or consequence being attached to the non-compliance.—[BALL, J. Why should the particulars be delivered in any case, if the enactment is merely directory.]—The remedy for the neglect would be an action on the case against the landlord, as clearly intimated by the late Solicitor-General Moore, when acting as Judge of Assize, in the case of *Fox v. Lynch* (c). At all events

(a) 1 C. & D. 489, C. C.

(b) Jebb's Res. Cas. 321.

(c) 1 C. & D. 227, C. C.

a mere affirmative or positive direction will not make the requirement mandatory; *Rex v. Leicester (justices)* (a). For instance, the 11th section of the 1 & 2 G. 4, c. 59, has been held to be merely directory, although an express duty is thereby imposed; *Doe dem. Philips v. Evans* (b). The case of *Rex v. Bermingham* (c), decided on the 4 G. 4, c. 76, s. 16, is to the same effect in principle.

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Our next proposition is, that it is not necessary that the particulars should be delivered “*at or before* the time of the distress made.” If tendered at any reasonable time after, or in the course of the same day, it would be sufficient, there being nothing in the 6th section to shew that it is imperative that it should be done forthwith; and, therefore, the issue which has been tendered is too narrow—the proper issue should have been, “*at or, a reasonable time after, &c.*”

In the next place, assuming that the 6th section applies to replevins in the Superior Courts, the plaintiff is bound to maintain that the non-delivery of the required specification makes the party distraining a trespasser *ab initio*—otherwise, the taking having been lawful, the plea is no bar to the avowry, and we must have judgment on demurrer. The direction of the Legislature is restrictive of a common law right, and ought, therefore, to be construed strictly. The record in this case admits, by the omission to plead either *non tenuit* or *riens in arrear*, the landlord's right to distrain; the distress was, therefore, lawful at its commencement, and then it must be contended, that the subsequent neglect to deliver the particulars made him a trespasser *ab initio*. But there is no case in which a party has been held to be a trespasser for a mere *nonfeasance*: *Fox v. Lynch* (d); *Shapcott v. Winford* (e); *Lynn v. Moody* (f); *Six Carpenters' case* (g). In the latter of these cases it was expressly held, that a subsequent irregularity is not sufficient to make the distraining party a trespasser *ab initio*, some positive act, such as an abuse of the distress, is necessary. At all events, the defence contained in the plea is not available on this record; for the illegal taking is the gist of the action, while it is admitted that the taking here was lawful, but that there was a subsequent omission to do a particular act, which might be the subject of an action on the case, but is no answer to our case as it appears on the record. On the English Act 2 W. & M. c. 5, s. 2, which authorises a sale of the distress after five days' notice, it has never been contended that the omission of the notice was a defence to the action. No such plea is to be found in the books; and yet that which has been pleaded in this case is exactly the same in nature and principle. The

(a) 7 B. & C. 12.

(c) 8 B. & C. 29.

(e) 1 Ld. Raym. 188.

(b) 3 Tyrr. 339.

(d) 1 C. & D. 227, C. C.

(f) 2 Str. 851.

(g) 8 Co. 290.

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plaintiff is bound to maintain all of the foregoing propositions against which we have been arguing, and if he fails in any one of them, we are entitled to judgment.

Mr. *Napier*, with whom was Mr. *Wall*, in support of the plea.

The real and important question in this case is, whether the provisions of the 6 & 7 *W. 4*, c. 75, s. 6, are confined to cases of distress within the Civil Bill jurisdiction, or whether they extend to all cases of distress, rendering it incumbent on the landlord to serve the required notice substantially at the time of making it, without reference to the amount of the yearly rent or the rent distrained for. Our view of the statute in question is, that in order to effectuate the purposes contemplated by the Legislature in giving jurisdiction to the Civil Bill Courts, it is necessary to serve the specification of particulars in every case in which a distress is made. In the first place, it is remarkable, that in all the other sections which relate to replevins, as well those which precede, as those which follow, the 6th section, there are restrictive words confining them to cases in which the rent distrained for does not exceed £50; but in the 6th section these have been omitted; and if we can discover any reasonable object to be collected from the Act itself, for making the enactments of that section general, the Court will not cut down the plain, obvious, and natural meaning of the words used by the Legislature. That object we shall now proceed to trace.

There was no Irish enactment corresponding to the 2 *W. & M. c. 5*, which empowered the sale of a distress under certain restrictions, until the 25 *G. 2*, c. 13, s. 5, in which, however, there is no notice required to be given (as in the English Act) to the party distrained upon, previous to the sale of the distress; and the first statute which, in this country, required any notice to be given to the tenant on whom a distress has been made, is the 6 & 7 *W. 4*, c. 75. Before that Act, the tenant, for whose relief it was passed, had no means of knowing the cause of the distress, nor the party distraining; and its object was to enable him, where the rent distrained for did not exceed £50, to take advantage of the cheap and speedy remedy provided by the Act, instead of resorting as theretofore to the Superior Courts. The tenant being the party who was to have the opportunity of deciding whether he should go into the Civil Bill Court, he was to be told the amount for which the distress was made; and that information was to be furnished by the party distraining, at the time of making the distress. Suppose even that the notice specified an amount of rent distrained for exceeding £50, yet if rent had been paid, the service of the particulars required by the 6th section would enable the tenant to know who was the party distraining, and thereby furnish him with the means of ascertaining whether or not rent to that amount was or was not actually due; and if not actually due, the Civil Bill remedy would be

open to him; for the words of the 5th section* are, "the rent for or in respect of which any distress shall be *or ought to have been made*." Suppose a case of conflicting landlords, one of whom had distrained upon the tenant, the service of the particular would enable him to ascertain which of them was the distraining party, and whether he had any set-off against him, or rightful deductions of head rent paid. In fine, the 16th section by repealing several previous statutes, which were general enactments as to distresses, gives a rational intimation that the Act is not wholly confined to cases within the Civil Bill jurisdiction, but that general purposes were intended to be considered. With respect to the position that the issue is too narrow—by reason of there being nothing in the Act requiring the delivery of the particulars *at or before* the making of the distress,—the majority of the Judges adopted the view taken by Baron Foster in *Brown v. Motherwell* (a), viz., that the service of the particulars must be contemporaneous with the distress.—[FOSTER, J. Substantially at the time of the distress. Every thing in that report is very fair, with the exception of the statement respecting the majority of the Judges, which is rather too strongly worded—there having been, if I remember rightly, a bare majority of one in the opinions of the Judges, in favour of my view as to the provisions of the section being mandatory.]—It has, however, been expressly decided in the case of *Orr v. Stevenson* (b), that the particulars of the demand must be served contemporaneously with the making of the distress; and in the case of *Murphy in replevin v. Butler* (c), it has been held by seven Judges out of ten, that the provisions of the 6th section are mandatory. Besides, the object of the notice required, being to give the tenant an opportunity of

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(a) 1 C. & D. 468, C. C.

(b) 2 C. & D. 228, C. C.

(c) Jebb's Resd. Cas. 321.

* It having been questioned whether the yearly reserved rent, or the amount of the rent distrained for, was to be the measure and criterion of the jurisdiction, it was agreed and resolved on by the Assistant Barristers, with regard to the 5th section of the 6 & 7 W. 4, c. 75, that "The jurisdiction is according to the arrear claimed, not the amount of the rent; thus if the rent be £200 per annum, payable quarterly, replevin could be maintained concerning the quarter's rent." It was also resolved, that if the distrainer delivers a particular of rent demanded exceeding £50, and the person distrained upon replevies, and brings a Civil Bill under this Act, and shews that a less sum than £50 is due, the jurisdiction attaches. But if, under the same circumstances, on taking the account, it appears that more than £50 is due, the plaintiff's bill must be dismissed, and the goods distrained returned, or the replevin bond, if required by the defendant, assigned. In the latter case, however, the landlord may waive the excess, and have a decree for £50; if it is expressed in the decree (in analogy to the 36 G. 3, c. 25. s. 8), that it is in full discharge of the landlord's demand. *Napier's Prac. of the Civil Bill Courts*, by Longfield, 202.

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tendering the sum due, which would be a good plea to an avowry, or of going into the Civil Bill Court, the directions must be obviously mandatory; otherwise the intention of the Legislature to extend a boon to the tenant would be defeated. If the words of the section were "shall or may," instead of "shall," there might be some ground for the argument on the other side; *Davison v. Gill* (a). As to what has been argued respecting the omission of the notice making the party distraining a trespasser *ab initio*, that proposition is laid down expressly in 7 *Com. Dig. Trespass* (c. 2), where it is stated that if a man has authority by statute, and does not pursue, or abuses his power, he is a trespasser—as if a man has authority by the statute of *W. & M.* to sell a distress for rent, if not replevied within five days after notice, &c., sells it without notice given. In conclusion, with reference to the observations which have been made by the Counsel on the other side, as to the conclusion to be drawn from the absence of the word "further" in the commencement of the 6th section, the observations of Mr. Justice Parke, in the case of *Earl Spencer v. Swanell* (b), shew that such a circumstance ought to lead us to the exactly opposite conclusion. He says, "That 'the absence of such a word indicates the intention of the Legislature 'to proceed to a new head of legislation.'"

Mr. *Macdonagh*, in reply.—Admitting that the 6th section is mandatory in the cases to which it applies, I shall confine myself to the maintenance of the opinion expressed by Mr. Justice Crampton in the case of *Carden v. Mahon*, and which was likewise held by Chief Justice Bushe in the case of *Balfé v. Hopkins*, which was tried at the last Trim Assizes, viz., that the statute in question, including the 6th section, is confined exclusively to cases within the Civil Bill jurisdiction. It is true, that the 16th section repeals several enactments of an apparently general nature, i. e., the 7 & 8 *G. 4*, c. 69, and part of 10 *Chas. 1*, sess. 2, c. 25, and of the 3 *G. 2*, c. 9. The first of these Acts (7 & 8 *G. 4*, c. 69) is that which gives a £10 jurisdiction, in replevin cases, to Justices of the Peace; and, instead of being a general enactment, it is wholly limited to an inferior tribunal. It is a key to the subsequent enactments on the same subject, inasmuch as its last section excludes tenancies of a certain description of tenure, viz., crown rents, quit rents, composition rents, chief rents, fee-farm rents, and rents on demises for lives renewable for ever, and for nine hundred and ninety-nine years—making the statute conversant with small holdings alone. This statute, the 6 & 7 *W. 4*, c. 75, enlarges, by, in the first place, increasing the jurisdiction to £50; and, in the second place, by the repealing clauses of the 16th section, which has the effect of extending it to all cases of distress, no matter

(a) 1 East, 72.

(b) 3 M. & W. 164.

what the tenure, or in what manner the rent is reserved. Such a repeal was necessary, as otherwise the Courts would have been in difficulty as to whether the cases which were excluded by the last section of the 7 & 8 G. 4, c. 69, were to be considered as within the provisions of the subsequent enactment of the 6 & 7 W. 4, c. 75. The two other statutes (10 Chas. 1, sess. 2, c. 5, and 3 G. 2, c. 9) have been only repealed as to the parts which relate to the appointing and proclaiming deputies, and making deliverance of distresses; which was absolutely necessary, as coming in collision with the newly conferred appointments and duties of replevinders throughout the Sheriff's district. The case of *Earl Spencer v. Swannell*, although cited by the other side, is an authority in our favour; for it was ruled in it that the 2nd section of the 21 Jac. 1, although in its terms general, was held to apply only to cases of the same description as those mentioned in the preceding section of the the same statute. In short, there is nothing to support the construction of the opposite side, except the word "all;" but that it has not the effect contended for, is clear from the case of *Rex v. St. Nicholas (a)*.—[BALL, J. Has it not been held, that the provisions of the 1 & 2 G. 4, c. 41, extend to cases of ejectment in the superior Courts, and yet the words are not more general than those in the section in question?—The preamble in that section referred to certain cases in which there had been doubts respecting the validity of the service of certain notices in ejectments, and the enactment, which was declaratory, was intended to put an end to those doubts. These cases were in the judicial knowledge of the Superior Courts, and they supplied them by extending the provisions to the ejectments in their own Courts; whereas, in this section, there is no preamble conveying a similar implication; but, on the contrary, the section commences with with a mere copulative article, connecting the subject matter with that of the preceding section.

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In stating my individual opinion on this case, which has been so clearly and so ably argued before the Court, I shall not enter into much detail. The broad and simple question is, whether the provisions of the 6th section of the 6 & 7 W. 4, c. 75, are universal, and extend to all cases—or limited and confined, as contended by Counsel for the plaintiff, merely to cases falling within the Civil Bill jurisdiction. I am of opinion that the section in question is confined to cases of distresses for rent, falling within the jurisdiction of the Civil Bill Courts.

Looking at this statute and the antecedent enactments on the same subject—taking into consideration its particular object—looking at its title—its preamble, and the several sections which have been particu-

(a) Burr. S. C. 91.

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larly pointed out; but, more especially, reading this 6th section with its context—that is, in conjunction with the 5th, 7th, and 8th sections—it appears to me, that we are warranted in reading it as if the word “such” occurred in that section; and in treating it, therefore, as referring to the distresses, which are the subject of the previous and subsequent provisions, the sound rule of construction, that the intention of the Legislature, as it is to be collected from the enactment, must prevail, is what must guide us in the construction of this section—and little if any, assistance, can be expected from any decided case. I may be allowed to add, that this Act has now been in operation for six or seven years; and yet, previous to the present case, there has not, so far as I am aware of, been an instance in which a landlord distraining for rent, amounting to a sum beyond the Civil Bill jurisdiction, has considered himself bound to give a notice in conformity with the 6th section of this statute. Although this may not, strictly speaking, be an argument, it shews, at least, what has hitherto been the general impression of the Profession—and, as yet, there has not been any decision on the subject. I say, there has not, as yet, been any decision on the subject; for although the Counsel for the defendant have referred to a case in which Mr. Justice Crampton is represented to have stated, that it had been decided that “the provisions of the sixth section were limited to cases of distress within the limits of the Civil Bill jurisdiction, yet, neither my own memory nor that of my Brethren has been able to supply the case to which that learned Judge alludes; and I have just written to Judge Crampton to know whether he could assist us, but he is not able to do so at the moment; so that I consider this case as one in which we are without any authority to be derived from a decided case. Allusion has been made in the course of the argument to some decision on this statute by the Twelve Judges on cases reserved; but it is obvious that the precise question which we are now called on to decide, could not, from its nature, have come in this shape under their consideration; but merely a question as to whether the provisions of this section are mandatory or directory. The question now before us is, for the first time, brought before a Court for judicial consideration; and I am of opinion, that the provisions of the 6th section have reference only to cases falling within the Civil Bill jurisdiction; and I should be slow in pronouncing, that it is incumbent on the landlord distraining for rent in every case, be the amount what it may, to furnish the particulars of his demand, pursuant to the provision of this section. I can see great advantages likely to result from such notice being required in cases of small holdings, and in transactions with the smaller and poorer tenantry of Ireland; but were such notice to be required in cases within the jurisdiction of the superior Courts, I can see no reason why a similar change in the general law and practice of distress should not be extended

to England—where it is not pretended that there is any similar enactment. I am of opinion that the provisions of the 6th section of the statute in question, are not applicable in the case now before the Court, and that the demurrer must be allowed.

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TORRENS, J.

I concur with my Lord Chief Justice—but as this is a case in which the question to be decided arises for the first time, as far as I am aware, on a new statute, I am desirous of assigning my reasons for the conclusion at which I have arrived. Great mischiefs resulted previous to the 7 & 8 G. 4, c. 69, by reason of parties holding lands at low rents being harrassed, and frequently subjected to oppressive distresses for an undefined amount of rent; and accordingly, with a view of remedying such abuses, the Legislature passed the foregoing statute, giving magistrates the power of deciding certain cases of replevin in a summary way, where the rent doth not exceed the sum of £10. The provisions of that statute were found ineffectual to remedy the mischief; it was therefore repealed, by the 16th section of the Act now under consideration, and a new jurisdiction to the value of £50 was given to the Court of Quarter Sessions. In the repeal of the statute of the 7 & 8 G. 4, by the statute now under discussion, the Legislature does not declare that the mischief had ceased, but that the remedy was ineffectual and a nullity; it transfers from one Court to another a more enlarged remedy to meet a still existing mischief. Let us consider then, whether the intention of the Legislature is not carried out in the words they have used in the statute now under our consideration. Its title is, “An Act to “extend the jurisdiction, and regulate the proceedings of the Civil Bill “Courts in Ireland;” and although I admit that the title of a statute cannot control the manifest enactments of it, yet it is the duty of the Court to call it in aid, when it can throw a light on an ambiguity in any of its provisions; and here, on reference to the title, we find, that it was intended to extend the jurisdiction from £10 to £50, and to vest it in the Civil Bill Court. Now, the question is whether this construction is to be controlled by the words of the 6th section. It must be admitted, that the words are sufficiently large to extend the provisions to all cases of distresses; but would such a latitude be consistent with the other sections of the same statute? I think not, and should, therefore, be slow to extend that section in the manner contended for by plaintiff's Counsel. On this subject, that part of the argument of Mr. Fitzgerald appears to me to have some weight, in which he referred to the provisions of the statute with respect to executors and administrators, as illustrative of what was the intention of the Legislature, notwithstanding the language they may have used. A new jurisdiction with respect to the recovery of legacies and distributive shares, where the assets did

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not exceed £200, is created by the 17th section of this same statute, and in the 22nd section it is enacted, that "every executor or administrator" may be compelled by summons to attend the Civil Bill Court. Here, it might be said, on the principle of construction contended for by the plaintiff's Counsel, that these words, which are as full and comprehensive as those of the 6th section, include every case of personal representation, whether the assets amounted to £100, or to £100,000. Such is not, however, the meaning or intent of the enactment; and, therefore, where we find words so exceedingly general as those of the 22nd section, controlled by those of the preceeding sections, it appears to me that the general words of the 6th section ought likewise to be controlled and restricted to the subject matter of the preceding and subsequent sections. I have already touched upon the mischiefs which it was the object of the Legislature to remedy by the provisions of these several statutes—now, let us see which are the advantages that must accrue to the tenant, by requiring notice from the landlord of the particulars in cases where the holdings are small. It must obviously be of advantage to such a person, who is likely to suffer by excessive distresses, to be furnished with a clear notice of his landlord's demand, thereby remedying the mischief which must probably arise to the tenant from the custom of small running accounts with his landlord, by putting him in possession of a definite statement of the demand, whereby he may be put in a position to resist the distress effectually, or of paying it without danger of further dispute. This is the mischief which is in my opinion provided against, and remedied by, this section; and it is obviously one which was not likely to occur between a landlord and tenant, where the amount of the rent due was considerable, and which for that reason was not likely to be so often the subject of litigated dispute.

FOSTER, J.

I wish that it were in my power to come to the same conclusion as my Brethren in this case; entertaining as I do, a strong opinion that it would be much more desirable that the state of the law should be what has been laid down by them, than that which it appears to me to be. The landlord here has proceeded to distrain for an amount of rent exceeding £50, but he has not served the notice which a distraining landlord is required to give by the 6 & 7 W. 4, c. 75, s. 6; and the question is, whether a person who admits himself to be a tenant is therefore entitled to treat his landlord as having been a trespasser in making the distress. The tenant does not dispute that he owes the landlord £120 for arrears of rent; we may consider him as in fact saying: "True it is, I am your tenant; true it is, I owe you £120 for an arrear of rent; but I rely on it that I am entitled, by virtue of the 6th section of the 6 & 7 W. 4, c. 75. to treat you as a trespasser, for trying to make

"me pay you by distraining me in a manner, which, I must admit, would "have been perfectly legal prior to the passing of that Act of Parliament." But, however much we may condemn such a defence by the tenant, the question is, whether under the provisions of the Act of Parliament, he is entitled to rely on it; and I regret to say, that it appears to me he is. That may possibly be a good reason for the Legislature interfering to alter the Act. But our only question at present is, what is the existing law.

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Now, the words of the 6th section are as follows: "And be it enacted, "that in *all* cases of distresses for rent, the person making any such "distress, shall deliver to the person in possession of the premises, for "the rent of which such distress shall be made; or in case there shall "not be any person found in possession, shall affix on some conspicuous "part of such premises, a particular in writing of the rent demanded, "specifying the amount thereof, the time or times when the same accrued, "and the person by whom or by whose authority such distress is made."

The landlord here has distrained; and has not furnished this particular in writing, and relies upon it that it is only in case the rent distrained for is less than £50, that he is required to furnish such a particular. But it appears to me impossible so to limit the enactment of this section. The words of it are express, that "*In all cases of distress for rent,*" the distraining landlord shall so proceed; and I confess that I can see a reason why the Legislature may have required him to give this notice, even in a case where the magnitude of the arrear might prevent him from proceeding to assert his right in the peculiar manner which the Act supplies to him, when the arrear is less than £50. The Legislature may have possibly thought it right, that the tenant who was the object of the distress, should be apprized, in the first instance, of the nature of the proceedings which the landlord was about to institute; and this might well be inferred from the fact whether the amount of rent that was due was less or greater than £50. But however that may be, the Legislature have imposed upon the landlord by this 6th section, the duty of giving the notice in all instances in which he resorts to distress; and the question here is, whether a landlord who has omitted to give the notice, may be treated by his tenant as a trespasser.

I feel the inconvenience of holding that the tenant may so treat his landlord, to be very great; but that consideration is for the Legislature, and not for the Court.

BALL, J.

With respect to the requirements of the 6th section of the 6 & 7 W. 4, c. 75, being mandatory or directory, or whether the non-compliance with them renders the landlord a trespasser *ab initio*, or not, it is unnecessary for me to give an opinion, inasmuch as I have arrived at the

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same conclusion, and for the same reasons, as my Lord Chief Justice and my Brother Torrens, on the subject of the enactment in question, viz., that it does not extend to any cases but such as are within the jurisdiction of the Civil Bill Courts; and if this opinion be correct, it disposes of the whole case. A great deal of argument has been used by Counsel in favour of an extended construction of this section, drawn, not from the Act itself, nor from its purview, but from the policy of giving it such a construction. If addressed to the Legislature, who are to make laws, such a line of argument might be available; but not so, when addressed to us as Judges, who are to expound and administer them. Accordingly, leaving that part of the argument out of the question, and taking up the remainder, we shall find that it is entirely based on the use of the word "all"—the section enacting, that in "*all cases of distress*," a certain specification in writing must be delivered to the tenant. Now, the word "all," if uncontrolled, does undoubtedly (speaking grammatically) embrace every particular; but it cannot be contended that the universality of the term may not be restrained by the subject-matter of the Act, which, in this instance, appears by its title, its preamble, and its whole purview, to be limited to a particular class of distresses, namely, those within the jurisdiction of the Assistant Barrister. But (if it were necessary) the universality of the term "all" might appear perhaps to be still more amply satisfied in the manner suggested by Counsel for the defendant, viz., by a reference to the provisions of the 7 & 8 G. 4, which were confined to distresses in particular classes of tenure, excluding all others; and the terms "*all cases of distress*," used in this Act (which, in section 16, repeals the 7 & 8 G. 4) may have been intended to take in those excluded cases, and extend the provisions of the 6th section to all cases of rent reserved, not exceeding, however, in amount £50. But we are still further warranted in such a line of construction by the 22nd section of this very Act, where the terms "every executor or administrator" are fully as comprehensive as those in the section under our present consideration; and yet it cannot be questioned that the Court is bound to confine the operation of the 22nd section to a particular class of executors or administrators, viz., to those whose testators' or intestates' assets do not exceed in value £200: so that the Court must read the 22nd section as if the word "such" were introduced immediately before the words "executor or administrator;" and so likewise must we read the 6th section, as if the word "such" were interposed between the words "all" and "*cases of distress*." The 1 G. 4 c. 41, was referred to in the argument; and it was mentioned that it had been at first doubtful, whether the 2nd section of that Act, relating to the service of notices, was to be limited to cases of ejectment within the Assistant Barrister's jurisdiction, by reason of the title and general purview of the Act, or to be extended to all cases; and it was decided

that it should be construed as having a general import. But there the Court had the strongest intimation that such was the intention of the Legislature, in the words of the preamble to the 2nd section itself; whereas here, instead of a preamble to the 6th section of the 6 & 7 W. 4, c. 75, intimating an intention to extend the subject-matter of the rest of the enactment, we have the copulative "and" commencing the section, connecting it with the preceding enactment, as if no new subject-matter was intended to be introduced, and leading the mind naturally, by the omission of the word "further," or "also," to conclude that the subject-matter of the previous section was intended to be also the subject-matter of the 6th. For these reasons, I concur in the opinion of the majority of the Court, that the demurrer must be allowed.

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Allow the demurrer.

COPPINGER v. O'DELL.

MR. O'BRIEN, Q. C., applied for liberty to serve a notice of motion to set aside a verdict, this being the last of the first four days. The papers connected with the case did not arrive in town until the preceding day, so that there was not time to serve notice of motion for the conditional order, according to the rule* of the Court. The Attorney offered to get an affidavit that the party who ought to have forwarded the papers from the country, either was not aware of the record being in this Court, or that such a rule existed.

DOHERTY, C. J.

Such an affidavit would not be a sufficient excuse for non-compliance with the rule of the Court; and we must, therefore, refuse the motion.

Easter Term.
April 19.

The Court will not give leave to serve notice of motion for a new trial on the last of the first four days, although an affidavit be made of the party being ignorant of the record being in this Court, or of the rule of the Court.

No rule.

* Notice of motion for a new trial must be given in the Courts of Exchequer and Common Pleas; but in the former it may be given on the fourth day, and actually moved within six days—whereas, in the Common Pleas, the motion must be actually moved within the four days.

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Common Pleas.

April 20.

LYNCH v. the Heir and Terretenants of LYNCH.

The Court set aside a judgment marked in an action of *sci. fa.* by the defendant, for want of a replication, the plaintiff having omitted to enter a rule to discontinue, under a mistaken impression, although the defendants had relied on the same in an answer to a bill filed in Equity by the plaintiff to raise the amount of the judgment.

The Court have not jurisdiction to order a party to pay to another costs incurred in Equity proceedings.

MR. WALL moved to set aside a judgment which had been marked by the defendant for want of a replication. After a plea to the *scire facias*, the plaintiff filed a bill in Equity, without entering the rule to discontinue. The plaintiff had given additional time to the defendant to file his answer in the Equity suit, under the impression, that in consideration thereof, judgment was not to be marked. Judgment was, however, afterwards marked by the defendant, who denied having entered into any such arrangement, and on the same day he filed his answer to the plaintiff's bill, in which he relied on the judgment so marked.

Mr. Close, *contra*.—This judgment cannot be set aside, because we have in our answer relied on it. At all events, if the Court should think proper to set it aside, it ought to be on the conditions of the plaintiff paying the costs of the Equity proceedings.

Per Curiam.

That is matter for a motion in the Court of Equity; but we have no jurisdiction to make such an order—nor can we permit this judgment, entered under such circumstances, to be wielded in a Court of Equity. We shall, therefore, set aside the judgment on payment by the plaintiff of the costs of marking it; but no costs of this motion.

April 22.

Lessee CASHIN v. COADY.

Where a defendant is put into possession by a brother-in-law of the lessor of the plaintiff, who lived in the same house with her, and tilled the lands; and the lessor of the plaintiff afterwards

stated to the defendant, that "as the lands were to be canted, she was glad that he had got them sooner than any other person." *Held*, that ejectment could not be maintained without a previous demand of possession.

THIS was an ejectment on the title, which was tried at the Kilkenny Assizes before Mr. Justice Ball. It was proved at the trial that M. C., from whom the lessor of the plaintiff derived title, died in 1832, leaving three sons who died without issue, and three daughters—one of whom was dead, another was the lessor of the plaintiff, and the third, who had also died, had been married to a person of the name of Dwyer, who lived in the same house with the lessor of the plaintiff, and tilled the lands in question; and while so situated, put the defendant into lawful possession of them.

It also appeared, that after this possession had been given, the lessor of the plaintiff stated to the defendant, that "as the lands were going to be canted, she was glad he had got the same sooner than any other person." This, Counsel had contended, was such a lawful occupation of the land, as entitled the defendant to a demand of possession, which had not been made; but a verdict was, notwithstanding, entered up for the plaintiff, subject to the point.

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Mr. *James Dwyer* now moved that the verdict should be set aside, or a nonsuit entered up pursuant to the liberty reserved at the trial. The defendant was put into lawful possession by a person duly qualified, which alone entitled him to a demand of the possession; the rule being, that wherever the commencement of a tenancy is lawful, it cannot be otherwise terminated; *Right v. Beard* (a); *Doe dem. Newby v. Jackson* (b); *Daniel v. Tierney* (c); *Walker v. Byrne* (d). A mere permissive occupation is sufficient to require a demand of possession before an ejectment can be sustained; *Fleming v. Neville* (e). A tacit acquiescence would be sufficient, and much more a direct expression of acquiescence on the part of the plaintiff, given after the commencement of the defendant's possession; *Doe dem. Cates v. Somerville* (f).

Mr. *Hatchell*, Q. C., and Mr. *O'Donnell*, contra.

We do not deny but that if the defendant is in lawful possession, he is entitled to a demand of possession; although even this principle has been carried too far. The possession, however, to be lawful, must be when a party has come in by legal title. This is the principle of law on this subject as laid down by Lord Coke; and can it be said that there was any evidence of Dwyer having any authority to give a legal title to the defendant?—[*Per Curiam*. It is not a case of commencement of tenancy by strict legal title, but of acquiescence in possession by the party having legal title.]—The declaration of the lessor of the plaintiff, even if evidence of acquiescence, may have been made after the day of the demise.—[BALL, J. That would be inconsistent with the service of the ejectment, as it intimates approval on the part of the plaintiff.]—At all events, if it were a case of permissive occupation, the defendant ought to have called on the Judge to leave that question to the Jury; *Jones dem. Gash v. Cotter* (g); *Doe dem. Bagwell v. Boland* (h); *Lessee Phayre v. Fahy* (i); *Doe v. Bradbury* (k).

(a) 13 East, 210.

(c) Jones, 258.

(e) Hayes, 23.

(g) 2 H. & B. 203.

(i) 1 H. & B. 128.

(b) 1 B. & C. 448.

(d) 3 L. R. N. S. 68.

(f) 6 B. & C. 126.

(h) 2 J. & S. 289.

(k) 2 D. & R. 707.

E. T. 1842.

Common Pleas.

Lessee of
CASHIN

v.

COADY.

TORRENS, J.

The question we have to decide rests not on the authority of other cases; but whether this case applies to the principle of law, that a permissive enjoyment of the premises must be terminated by a demand of possession. The declaration of the lessor of the plaintiff, made after possession had been given by her brother-in-law to the defendant, is clearly evidence of acquiescence on her part in that possession. The rule, therefore, of the Court is, that a nonsuit be entered in pursuance of the liberty reserved by the Judge at the trial; the defendant being, of course, entitled to the costs of the nonsuit and of this motion.

R E I D

v.

MITCHELL, one of the Public Officers of the Belfast Banking Company.

April 22.

By the operation of the rules of this Court, a party taking a bill of exceptions at a trial in the Sittings after Term is not irregular, in not setting down the same for argument in the ensuing Term.

A BILL of exceptions had been taken in this case by the defendants, at the trial which was had at the Sittings after last Michaelmas Term. The parties went before the Chief Justice on the 31st of December, for the purpose of having it settled from the Judge's notes; and the draft having been finally arranged and signed by both parties, was on the 5th of January signed by the Chief Justice. The defendant's Attorney applied to the Officer to have the exceptions received, and was informed by him that as the *postea* had not been lodged by the Registrar, they could not be received; and that it was not usual to lodge the *postea*s of causes which had been tried at the Sittings after Term, until immediately before the first day of the ensuing Term. The *postea* having been accordingly lodged on the 10th of January, the exceptions were lodged within the first four days of Hilary Term; and were afterwards set down for argument in this Term. The plaintiff's Counsel now objected to the cause being heard, as having been entered too late, by the rule of this Court of the 20th of January 1820—"That if the parties tendering bills of exceptions, do not bring in, and set down the same for argument, within the first four days, or obtain orders for enlarging the time for bringing in the same, the Officer at *Nisi Prius* do hand over to the party obtaining the verdict the *postea*; and that the parties be precluded from proceeding on the said bill of exceptions;" *Moore & Low. R. 84.*

Mr. Napier contended that the course taken was perfectly regular, and that the defendants could not have set down the exceptions for

argument sooner than the present Term, by reason of the rule of the 20th of November 1825, which requires, that "all causes for argument "in which books are to be made up for the Judges, such books shall be "made up and delivered to the Judges, and the cause entered in the list "of law arguments previous to the first sitting day of the Term in which "the cause is set down for argument, otherwise such cause will not be "heard during the said Term;" *Moore & Lowry's Rules*, 93. There is no instance in the books of an application for enlarging the time for setting down a bill of exceptions for argument—applications of that description having been always for time to make up the bill of exceptions.

E. T. 1842.
Common Pleas.

REID
v.
MITCHELL.

Mr. *Whiteside* and Mr. *Rolleston*, *contra*.

The practice in the Queen's Bench, as required by their rules, is that the bill of exceptions should be returned and made up within the first four days; but the Common Pleas goes further, and requires that they should be *set down for argument*; and the time for setting them down for argument will not be extended by the Court, unless on very special grounds; *Ferg. Pract.* 1010. In the Queen's Bench, it was even held that the consent of the parties would not dispense with this rule; *Lessee Dawson v. Bell* (a); *Blackwood v. Gregg* (b); *Hill v. Watts* (c). The two rules of the Court are quite consistent, as the only effect of the second rule is, that if the books are not made up and delivered before the first day of Term, the penalty is that the case cannot be heard during the Term; but it does not obviate the necessity imposed by the first rule, that the exceptions should be *set down for argument*. In fact, the exceptions may be set down for argument, although it cannot be heard before the books are made up. The other side ought to have moved to enlarge the time for setting them down for argument.

DOHERTY, C. J.

We are hardly called upon to decide the strict rule, whether the argument of a bill of exceptions must be postponed by the operation of the two Orders of the Court which have been adverted to, until the second Term after the trial—in fact, whether a party taking exceptions can thereby delay his antagonist for such a length of time as two Terms. Here is a case in which a substantial question has been raised on the record, which it is of importance to have argued; and the bill of exceptions having been finally settled and signed on the 5th of January, it is said that the party ought to have come in and applied to enlarge the time for setting it down for argument; but, instead of that, they call on the other side to join in the expense of making up the books; and they,

(a) 2 Ir. Law Rep. 279.

(b) *Hayes*, 20.

(c) *Al. & N.* 130.

E. T. 1842.

Common Pleas.

REID

v.

MITCHELL.

on the other hand, in place of moving that the *postea* should be handed over to them, join in the expense of the books, and nothing more is heard on the subject until this Term, when it is entered for argument; and when the case is called on to be heard, the objection is, for the first time, started. These circumstances are a sufficient waiver of any such objection, supposing it to be well founded; and even if the case were stronger than it is, we should not be inclined, on the construction of the rules, to exclude a party having an important question to be argued.

The Chief Justice having left the Court, there was some further discussion on the subject.

TORRENS, J.

The Chief Justice having intimated the opinion of the Court on the question before it, little remains to be said, except that we think that on both of the points which have been discussed, the defendants are entitled to have their case argued. Our construction is, that the two rules must be taken to work together; and, therefore, it having been impossible that the books could have been made up before the filing of the record (not of the *postea*) which is suspended in the hands of the Registrar by the Judge's certificate—and also impossible to set down the case for argument before the books are made up, by reason of the provisions of the later rule—on the reasonable construction of these rules, the defendants have been regular in their proceedings. In the other point of view also which has been discussed, they are entitled to have the case argued. Here is an active party waiving any irregularity, by having gone before the Chief Justice in the first instance, and afterwards concurring in the making up of the books, and taking no step to render it incumbent on the Registrar to file the record before the first day of Term, as it was competent for him to have done by application to the Judge, or in Chamber. All this is evidence of acquiescence in, and a waiver of, any irregularity, if it had existed. We are, therefore, of opinion that the defendants are entitled to have their case argued.

E. T. 1832.
Common Pleas.

Lessee M'DONALD v. LAWTON.

April 25.

THIS was an ejectment on the title, which went down to be tried at the last Assizes for the county of Carlow, but owing to the fatality of the protraction of a trial at the preceding Assize town, the Attorney for the defendant had not been able to reach Carlow until after the case had been called on and disposed of for want of an appearance.

Where a defendant in an ejectment has judgment against him for non-appearance to confess lease, entry, and ouster, the Court will not grant a new trial on any terms, unless it clearly appears that the defendant has a just and legal defence to the action.

Mr. *Pakenham*, on behalf of defendant, now moved on an affidavit of merits, that the judgment of nonsuit for non-confession of lease, entry, and ouster, should be set aside on payment of the costs of the trial, and an undertaking to go to trial in this Court on the first *Nisi Prius* day of the present Term. There are many cases in which the Court has directed new trials in undefended cases, even where the Attorney has been guilty of gross neglect, on payment of costs: *Beazley v. Shapleigh* (a); *De Rouffigny v. Peale* (b); *Foudrinier v. Bradbury* (c); *Lee v. Joseph* (d). —[*Per Curiam*. Have you any instance of such an application having been granted in an ejectment case, where the rights of parties are not concluded by the verdict?—There was an unreported case in the Exchequer, in which I recollect the verdict to have been set aside on the authority of *De Rouffigny v. Peale*; and very properly on principle, inasmuch as if we are turned out of possession we shall be in a very different position from the present.

The Court will not suspend the execution of the *habere*, in order to give a party the opportunity of filing a bill in a Court of Equity to sustain his rights.

Mr. *Berwick*, and Mr. *H. Smyth*, opposed the motion, unless the defendant undertook not to rely on some formal or technical point of law.

Mr. *Pakenham* stated his client's defence to be what he described as an equitable title in support of a strict legal bar of the Statute of Limitations.

DOHERTY, C. J.

The defendant comes here to ask a favour, and we must see clearly that the granting of it will tend to promote justice between the parties. We admit that where there has been a verdict or a nonsuit for non-appearance of a party, and an affidavit of merits, the Court will, on fair

(a) 1 Price, 201.

(b) 3 Taunt, 484.

(c) 3 B. & A. 328.

(d) 1 C. & P. 46.

E. T. 1842.
Common Pleas.

M'DONALD
v.
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terms being offered, grant a new trial. Full terms have, we admit, been offered in this instance—but what is the nature of the case? It is an ejectment on the title, in which a verdict is not a final bar to the defendant's rights, if he have any. Notwithstanding that, however, the Court would, if they were satisfied that there was a just and legal question to be tried between the parties, have put the case in the way of further investigation; and with that view have urged on Counsel for the defendant to disclose the merits of his defence; but after singular efforts to arrive at it, no one member of the Court has been able to discover what his defence is. The result, therefore, of granting this motion would obviously be, not to advance justice, but merely to give the defendant the chance of a verdict. The case, therefore, does not come within the ordinary rule, and the motion must be refused; but as the offer of terms has been very ample, we shall give no costs of the motion.

Mr. *Pakenham* applied to have the execution of the *habere* suspended for two days, in order that his client might have an opportunity of filing a bill in Equity to assert his rights, although he might not have a legal defence.

Per Curiam.

We never heard of such an application having been granted. A Court of Equity sometimes lends its assistance to a Court of Law in such respect, but there is no precedent of that position being reversed.

No rule.

FAHIE v. NASH.

April 30.

The defendant having prosecuted and convicted the process-server of perjury, under

an order of the Court, the Court set aside the parliamentary appearance and all the subsequent proceedings, with costs, and the costs of obtaining the order to take the affidavit off the file; but refused the costs of the motion, because the notice asked the costs of the proceedings in the Criminal Court.

Quere.—Has the Court any jurisdiction, under any circumstances, to order the plaintiff to pay to the defendant the costs incurred by him in the prosecution and conviction of the process-server in the Criminal Court.

* 2 Ir. Law Rep. 68.

The process-server having being accordingly prosecuted, and convicted of perjury, at the last Cork Assizes,—

E. T. 1842.
Common Pleas.

FAHIE
v.
NASH.

Mr. *Collins*, Q. C., and Mr. *Bowen*, now moved that the parliamentary appearance and all the subsequent proceedings should be set aside, and that the plaintiff should be ordered to pay to the defendant the costs incurred in the prosecution of the process-server, who was defended at the trial by the plaintiff's Attorney. The Court has a personal jurisdiction against the plaintiff for employing an unworthy process-server, and can, therefore, order him to pay the costs of the proceedings which have been thereby forced on the defendant, who had never heard of any demand of the debt from him until he was served with the writ of inquiry. The motion has never yet been refused on the principle of want of jurisdiction, but on the peculiar circumstances of the case.

Mr. *Otway*, *contra*.—As to the costs of setting aside the proceedings, where one of two innocent parties must suffer, it ought not to be the creditor, but the party who caused the proceedings by not paying what he admits to have been a lawful demand. With respect to the other question, the Court have no jurisdiction to order us to pay the costs of the proceedings in a Criminal Court: *Egan v. Doherty* (a); *Cosgrave v. McDonnell* (b); *Comerford v. Burke* (c).

DOHERTY, C. J.

In this case, it appears, that the first notice which the defendant receives of the proceedings is the notice which was served on him of the speeding of the writ of inquiry, and he then comes into Court to set aside the proceedings, and establishes by the verdict of a Jury that he never was served with the writ on which all those proceedings were founded. Under these circumstances we cannot refuse him the costs of setting aside the proceedings. The rule, therefore, of the Court is, that the costs of setting aside the parliamentary appearance, and all the subsequent proceedings, be paid by the plaintiff, and the costs of the previous motion to take the process-server's affidavit off the file. As to the remainder of the motion, we shall say no rule, and no costs of this motion—the defendant having asked too much in his notice. As to myself, I think that it is a matter worthy of consideration, whether, under the circumstances that have been disclosed—the plaintiff resisting the defendant's motion on his first coming in, taking an issue on the fact of service or no service, and his Attorney conducting the defence of the process-server at the trial—this criminal prosecution does not assume a civil appearance, so as to give us

(a) 2 Ir. Law Rep. 68.

(b) 2 Ir. Law Rep. 77, *note*.

(c) 3 Ir. Law Rep. 62.

E. T. 1842.
Common Pleas.

FAHIE
v.
NASH.

jurisdiction to decide the question of payment of the costs incurred by the defendant in bringing it to a conclusion. These considerations press upon me, I must confess; nevertheless, the opinion of the Court is, that we should abide by the order which I have already pronounced:—

That the parliamentary appearance, and all the subsequent proceedings in this case be set aside, the plaintiff paying the costs, and the costs of the previous motion; and no costs for this motion.

Lessee CHURCH v. DONNELL.

May 2.

A lease was executed, under a power which required the execution to be in the presence of two witnesses, in the presence of one subscribing witness, and in the presence of another person who could testify to the fact, but had not previously, nor at the time, been called upon to be a witness; Held, not to be a due execution under the power.

THIS was an ejectment on the title, which was tried before Burton, J., at the last Spring Assizes for the county of Londonderry. The defendant held the land under a lease made by a tenant for life who had a leasing power, and the validity of that lease under the power, was the question to be tried. It appeared that John Church, sen., had by his will devised his estates, of which the farm in question was a portion, to his eldest son George Church, for his life, with remainder to his first and other sons in tail male, with remainder, in default of issue, to his second son John Church, jun., and his sons in like manner; and in default of his issue, to the lessor of the plaintiff for life, with a similar remainder to his issue. It was also provided by the said will that, "It shall and may be lawful to
"and for each and every of my hereinbefore mentioned sons, to whom
"the freehold of the hereinbefore limited lands and premises shall come,
"whilst in his or their actual *seizin*, by any writing or writings, or indenture by him duly executed in the presence of *two or more credible*
"witnesses, to demise or lease all or any part of said lands, when and so
"often as the same shall be out of lease, for the term of one life, and a term
"not exceeding twenty-one years, to commence in possession and not in
"reversion, reserving upon every such lease or leases during the continuance of the same respectively, the best improved yearly rent that
"can be got for the same, without receiving or taking any fine or fines,
"or other consideration, to abate the said improved rent; and so as such
"lease be not dishonourable for waste." The said George Church having died without issue, the said John Church, jun., came into possession, and while in possession executed the lease in question; and having died without issue, the lands came into the possession of the lessor of the plaintiff, who brought this ejectment. It appeared that lease was executed in the presence of one John Martin, an Attorney, in whose office it had been prepared, and who subscribed his name thereto

as a witness; and on his cross-examination, he stated that there was another witness, Michael King, present at the time of the execution, who was at that time the apprentice of the witness, and who had engrossed the same, the seal with which it was sealed being also in his (Michael King's) possession. The lease was executed in the house of the said John Martin, who was at that time the agent of the lessor. The said Michael King was also produced, and examined on the part of the defendant, and stated that he saw the lease executed by both parties; and that he had attended as being the apprentice of John Martin, but was not called upon at the time, or previously required, to witness the execution of it. The plaintiff's Counsel insisted that the lease was void, as not having been warranted by the leasing power, by the true intent and meaning of which the lease should have been duly executed in the presence of two or more subscribing or attesting witnesses; or, at least, in the presence of two or more credible witnesses required to witness the execution thereof. The Judge refused so to direct the Jury, but reserved the objection for the Court, with liberty for the plaintiff to move to have a verdict entered up for him, in case the Court should be of opinion that the lease was not well executed under the power. The Jury found for the defendant; and a conditional order was obtained to change the verdict into a verdict for the plaintiff.

E. T. 1842.
Common Pleas.

Lessee
CHURCH
v.
DONNELL.

Mr. *James Shiel* now shewed cause.—The question for the decision of the Court is, whether a witness to the execution of a power, which does not expressly require that he should be a subscribing witness, should be previously summoned, or called on to attend as a witness. In the first place, it not being within the terms of the power that either of the witnesses should subscribe their names to the instrument executed under it, the following rule on this subject, as laid down by Sir Edward Sugden, applies—"It is clear that where an instrument executing a power is "required to be executed in the presence of two or more witnesses, and "nothing is said about their attesting the execution, the power will be "duly executed, although the witnesses do not subscribe the attestation "indorsed, or some of them do, and some of them do not;" *Sugd. on Powers*, 262 (4th ed.) The same passage is to be found in all the editions of that work. For this position, which shews that a subscribing and an attesting witness are the same, Sir Edward Sugden refers for his authority to *Sayle v. Freeland* (a). The same principle is laid down in *Chance, on Powers*, 336. It is not necessary that the witness should know the contents of the instrument—indeed he seldom does—and is, consequently, not bound by the contents. In the case of wills, the witness must be so at the instance and request of the testator; but it is otherwise in a deed: and if it be ruled that it is necessary that the witness should be specially

(a) 2 Vent. 350.

E. T. 1842. called on to act in that capacity, the Court must likewise decide who is
Common Pleas. the party to invite him.

Lessee
 CHURCH
v.
 DONNELL.

Mr. Major, Q. C., and Mr. Brooke, Q. C., *contra*.

Every circumstance required to the execution of a power must be strictly attended to ; *Sugd. on Powers*, 217 (4th ed.) ; and, therefore, if two witnesses are required by the terms of the power, two witnesses must be present, and recognised as such, at the moment of the execution of the power. This is evident from the ancient mode of witnessing, thus described by Lord Coke—"The witnesses were called, the deed read, and their names entered," this memorandum being added—"His testibus, A. B., C. D., et aliis ad hanc rem convocatis ;" *Co. Litt.* 6, a. ; 2 *Inst.* 78, c. 38 ; 2 *Bl. Com.* 311, 312.—[BALL, J. Suppose a person accidentally present, and without any express requisition, saw and was cognizant of what was going on, would not that be equivalent to his attention having been called to it ?]—Certainly not. Such would not be in accordance with the intention of the party creating the power, who required that two witnesses should be present, to give solemnity and security to the instrument. The witness under this power must be an attesting witness, although he need not be a subscribing witness ; and the case of *Sayle v. Freeland* does not sustain Sir Edward Sugden's position in this respect, as it is merely stated in it that "the third witness was present," which is the very point in dispute, viz., whether the party was constituted to be a witness or not. That case is, in fact, an authority for us, as the Lord Chancellor says, "Equity would help in such a little circumstance, where the owner of the estate had fully declared his intention ;" and adds, "There is a difference where a man has power to encumber a third person's estate—such powers are to have a rigid construction ; but "where the power is to dispose of a man's own estate, it is to have all the "favour imaginable." Mr. Starkie gives as a reason for the law requiring the production of an attesting witness, that "the parties themselves, by "selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument." *Stark. on Evid.* 320. The witness must be one within the contemplation of the donor of the power ; and if King was intended to be a witness in this instance, why did he not subscribe his name at the same time as the other witness ? The non-subscription, even independent of his own evidence on the subject, is a proof that he was not contemplated as a witness. The old common law practice of the witnesses being associated with the Jury, and joining in the verdict, shews that the party had a right to select his own witnesses : *Co. Litt.* 6, C. The evidence of the witness, if there is one, is of indispensable importance, and, therefore, he ought to be apprised of his character at the time of execution ; *Abbott v.*

Plumbe (a); *Fassett v. Brown* (b); *Grellier v. Neale* (c); *Fitzgerald v. Elsee* (d). It has been ruled, that if a person merely sees the instrument executed, as in this instance, and is not desired to attest it, he cannot afterwards, by putting his name to it, prove it as an attesting witness—being, in fact, as Lord Ellenborough observed, no attesting witness, but a mere volunteer; *McCraw v. Gentry*; 2 *Phil. on Evid.* 660.

E. T. 1842.
Common Pleas.
Lessee
CHURCH
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DONNELL.

Mr. *Sproule*, in reply.—The argument on the other side is founded on the sophism, that what is said of an attesting or subscribing witness (the terms being synonymous), is applicable to a case in which the only requisite is, that the power should be executed in the presence of two witnesses, not of two *attesting or subscribing witnesses*. The whole question, therefore, is, what is a witness? According to Doctor Johnson, a witness is merely “one who gives testimony,” being derived from a Saxon word signifying “to know.” Knowledge, therefore, is all that is required; and there is no authority* for any distinction between a witness to a deed, where subscription is not required, and a witness to a fact. Consequently, if it were necessary, in order that a person should be a witness, that he should have been called upon, as insisted by the other side, few men could have been convicted of treason, as few would have called upon the two witnesses required by the statute of *W. 3*, to be witnesses of their treasonable acts. The witness, in this case, says he was a witness, and the Jury believed him—so that the power has been duly executed in the presence of two witnesses, and to hold otherwise would be to decide, without any authority in law, against the meaning of the English language, as declared by Dr. Johnson.

DOHERTY, C. J.

The only question which we have to decide is, whether a certain lease was or was not made in conformity with a leasing power. This power authorized the party in possession, by any writing or indenture, to be by law duly executed in the presence of two or more credible witnesses, to

(a) Doug. 216.

(b) Peake N. P. C. 23.

(c) Peake N. P. C. 146.

(d) 3 Camp. 232.

* In reply to this position of there being no difference between a witness to a deed, and a witness to a fact, Mr. Major, after the argument, cited the following passage from Pothier on Obligations: “Witnesses produced to prove a fact, are not required to “have all the qualities which are necessary in those who are called upon to be present “at the execution of written acts, in order to give them proper solemnity; women, “foreigners not naturalized, members of ecclesiastical communities, are admitted to “depose in judicial examinations. The reason of this difference is, that there is a power “of selecting witnesses to complete the solemnity of acts, whereas no persons can be “brought to depose upon a matter of fact but those who have a knowledge of it.” 1 *Pothier on Obligations*, 517.

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demise or lease all or any part of the lands, when, and as often as the same might happen to be out of lease, for the term of one life, and a term not exceeding twenty-one years, &c. The only point for our consideration is, whether that requisition of the power had been complied with. On the production of the lease itself, it appeared that there was but one subscribing witness. Evidence was given that the lease was executed in the parlour or office of Mr. John Martin; that it had been prepared in the office of the said Martin, who was at the time the Attorney for both the lessor and the lessee, and that it had been filled up by a Mr. King, who was at that time, the apprentice of Mr. Martin; and that the said King was, at the time of the execution of the lease, present in the parlour of the said Martin, and saw the lease executed; but was not called on to witness the execution; he saw it executed by the two parties, but was neither previously, nor at the time, required to be a witness of the execution of it. Upon this state of facts the question arises: Was this lease executed in conformity with the power? Was it executed in the presence of two credible witnesses, within the terms and meaning of the leasing power? We think that it was not. We are of opinion, that although under the terms of the power it was not necessary that he should be a subscribing or attesting witness, yet that it is necessary that he should have been at the time of the transaction clothed with the character of a witness to it—one selected, designated, and called on, as one of the two persons to be witnesses to the execution, and apprised at the time that he is such witness. It is not enough that he should be a witness in the ordinary sense, capable of giving evidence of the transaction, but he must be a person selected and called upon by the parties. There being some novelty in the question, and no direct authority on the subject, we shall

Make the conditional order absolute without costs.

April 28.

MAGUIRE v. GARDINER.

Service of process on the keeper of the Marshalsea prison deemed good service of the defendant, who was in confinement therein, the said keeper having refused to bring him into the hatch for the purpose of having him served.

MR. PAKENHAM moved that the service of the process had be deemed good service. The defendant was confined in the Marshalsea prison, and the process-server applied to the keeper to have him brought into the hatch for the purpose of serving him, but the keeper refused to do so; and he then served the keeper with a copy of the process to deliver to the defendant.

Semble—The refusal of the keeper to bring forward the prisoner for the purpose of having him served, was a contempt of Court.

DOHERTY, C. J.

The conduct of the keeper was most improper, and we shall call on him to answer the matter of the affidavit within two days, or that an attachment against him do issue. As for the motion—

Let the service had be deemed good service.

E. T. 1842,
Common Pleas.

MAQUIRE
v.
GARDINER.

INNES v. WATERS.

May 8.

MR. MACDONAGH moved that the defendant, who had been arrested on a Judge's *fiat*, should be discharged, on entering a common appearance. The plaintiff had sworn, on the application for the *fiat*, that the defendant had sold his concerns in Innistogue, where he carried on the business of a baker, or was about to sell them, and then about to quit Ireland, unless forthwith arrested or held to special bail; and that it was commonly reported in his neighbourhood that he was about to proceed to America, which deponent believed to be true. It appeared by the defendant's affidavit, that he had been in the habit of purchasing goods from the plaintiff in the way of trade, and had been arrested on the 22nd of March, brought before a Magistrate, and committed to prison on a charge of an intent to defraud the plaintiff of a sum of £40, and to leave the country. He was detained in custody until the 31st of March, when he was discharged on giving bail to attend at the Quarter Sessions to stand his trial on the 2nd of April, when he appeared, but no indictment was preferred against him; and he was then arrested on the *fiat*, the affidavit having been sworn on the 30th of March. The defendant swore that he had never sold, nor was it in his contemplation to sell, make away with, or dispose of his dwelling-house and concerns, &c., with the view of leaving the country; nor did he ever circulate a report, or give any person reason to believe that it was his intention to leave Ireland and proceed to America or elsewhere, to evade the payment of his debts, or for any other purpose whatever. Counsel contended, that the defendant was entitled to his discharge, the affidavit on which the *fiat* was had having been insufficient, the plaintiff's belief having been founded on common report, and in the disjunctive. No facts were stated, as required by the 2nd section of the 3 & 4 Vic. c. 105, from which the Judges might draw the conclusion of the probability of the defendant absconding; *Bateman v. Dunn (a)*. Moreover, the plaintiff having arrested the defendant on a

The defendant having been arrested on a criminal charge of intent to defraud the plaintiff and abscond, which was not prosecuted; and afterwards arrested on a Judge's *fiat*, obtained on an affidavit which was sworn whilst he (the defendant) was in custody, stating the plaintiff's belief of an intention to sell his property and leave Ireland, as commonly reported in the neighbourhood--The Court refused to discharge the defendant from custody on entering a common appearance, he having only sworn that he had never sold, nor was it in his contemplation to sell, his property, with the view of leaving Ireland.

(a) 7 Dow. P. C. 105; S. C. 5 Bing. N. C. 49.

E. T. 1842. pretended criminal charge, as proved by the non-prosecution, had dis-
Common Pleas. entitled himself to the assistance of the Court.

INNES

v.

WATERS.

Mr. *Brewster, Q. C., contra.*—The facts of the arrest, and committal by the Magistrate, are confirmatory of the belief of the party that the defendant was about to leave Ireland. Besides, the denial of the defendant of such an intention is qualified, in swearing that he had not sold, or was intending to sell, with a view of leaving the country.

DOHERTY, C. J.

The fact of the arrest on the criminal charge is rather a confirmation than otherwise of the *bona fides* of the transaction on the part of the plaintiff, as it is very improbable that a respectable Magistrate would have signed a committal without some circumstances warranting a reasonable presumption of an intent to defraud the plaintiff. As to the other point, the defendant has not positively denied an intention of selling his property except for a special and qualified purpose, viz., of leaving the country; nor does he say that at the time of making the affidavit, he had no intention of disposing of his property, although he denies that he had such an intention some time before.

No rule.

BONSALL v. MACKLIN.

May 7.

The Court refused to set aside a parliamentary appearance, the defendant not having sworn to the merits, or stated how he obtained knowledge of the proceedings, or denied service of a copy of the process.

MR. CULLIGAN moved to set aside the parliamentary appearance and the subsequent proceedings, the defendant having sworn that he had never been served with the writ by the process-server, or by any other person; and that he had not been in the town in which it was sworn he had been served, on the day of the service.

Mr. *Skelton, contra.*—The defendant's affidavit is defective in not swearing to merits; and he does not state when or where he obtained the knowledge of the proceedings. Moreover, he only swears that he was not served with the process, without saying any thing about having been served with a copy of the process.

DOHERTY, C. J.

Let the motion be refused, with costs; the plaintiff being at liberty to enter an appearance on payment of the costs, as a condition precedent.

T. T. 1841.
Exch. of Pleas.

MURPHY v. BELLEW.

(*Exchequer of Pleas.*)

Trinity Term.
May 24.

ASSUMPSIT on an award. Plea, the general issue.—Upon the trial before Burton, J., at the Summer Assizes 1840, for the county of Louth, it appeared that Murphy the plaintiff, had been in the occupation of certain lands as tenant to one Curran, who had been tenant to Bellew, the defendant; and had laid out considerable sums of money in improvements upon the lands. Curran's term having expired, Bellew brought an ejectment against Murphy, and recovered judgment: and it having been agreed between Bellew and Murphy that the amount of compensation to be made by the former to the latter for his expenditure on the lands should be referred to arbitration, the following submission was executed by the parties:—"The award to be made between James Bellew and "Nicholas Murphy is to declare what amount may be the profits to be "derived by Bellew from the expenditure of Murphy, with allowance for "ditching and draining, as well as all buildings and manure, so as to extend "its benefits to any future crop. James Bellew named C. C., and Nicholas "Murphy named T. B. And should they not agree in their award, they "are to call in a third person to decide."

The arbitrators did not agree, and they called in an umpire; and on the 6th of February 1840, the arbitrators and umpire awarded as follows:—"The award come to by the arbitrators between Bellew and "Murphy is, that Bellew should give Murphy £107. 7s. on account of "profit calculated to accrue to Bellew, from the extent of Murphy's im- "provements: That Bellew give Murphy the use of the dwelling-house "and offices he occupies, to the first of May next: That on that day, "Murphy give up to Bellew the possession of said premises, leaving them "in the same repair as at present."

The defendant afterwards obtained possession of the premises, but refused to pay the sum awarded to the plaintiff; whereupon the present action was brought. The defendant insisted that the plaintiff ought to be nonsuited; first, because the matters in difference, referred to the arbitrators and umpire, related to an interest in land, and there was no sufficient submission in writing: and, secondly, because the award extended to matters not within the terms of the submission, and was,

Plaintiff having been in occupation of a house and land, expended money in improving them. Defendant recovered judgment in ejectment against him; and it was by submission in writing, referred to arbitrators to "declare what amount might be the profits to be derived by defendant from the expenditure of plaintiff, with allowance for ditching and draining, as well as all buildings and manure, so as to extend its benefits to any future crop."

The arbitrators awarded "that defendant should give plaintiff £107. 7s. on account of profit calculated to accrue to defendant from the extent of plaintiff's improvements: that defendant give plaintiff the use of the dwelling-house and offices to the 1st May next: that on

that day plaintiff give up to defendant possession of said premises, leaving them in the same repair as at present."

Held—that the portion of the award relating to the possession of the premises, was bad, as not being warranted by the submission; but that it was separable from the residue; and that the award for the amount of the improvements was good.

T. T. 1841. therefore, invalid. The learned Judge overruled these objections; but
Exch. of Pleas. gave the defendant leave to move for liberty to enter a nonsuit; and the
 MURPHY plaintiff obtained a verdict for £107. 7s. A conditional order for that
 v. purpose having been obtained—
 BELLEW.

Mr. *Gilmore*, Q. C., now moved to make it absolute. The award is not warranted by the submission; for the question as to the possession of the lands was not referred to the arbitrators; and though the defendant has since obtained the possession of the lands, that cannot alter the question as to the validity of the award; *Jackson v. Clarke (a)*. If the defendant had sought to enforce that part of the award which related to the delivery of the possession by the plaintiff on the 1st of May, he must have failed. Now, though an award may be good in part, and bad in part, that is only when the parts are separable, so that the Court can say, that the arbitrators could have been influenced by the one part, in forming the conclusion to which they come on the other; *Seccombe v. Babb (b)*. Here that could not have been the case, for the arbitrators would not have awarded so large a sum, if they did not think that they had the power to compel the plaintiff to give up possession to the defendant on the 1st of May.

Mr. *Holmes* and Mr. *Tomb*, for the plaintiff.

The first ground of objection is given up. As to the second, the possession was not a matter in dispute; and the Court is not to imagine that the arbitrators took it into their consideration when estimating the damages. The award as to the possession is clearly bad; but it is good as to the residue; for to avoid the whole award on this ground, it should appear on its face, that there was a necessary connection between the two things adjudicated upon. Here the £107 is expressly awarded for the improvements; *Johnston v. M'Allister (c)*.

Mr. *Whiteside*, in reply.—The award is bad, for there is no sufficient submission—the matters awarded relating to an interest in lands; *The Earl of Falmouth v. Thomas (d)*: and even if there be a sufficient submission, yet it is bad, because the excess is not separable; for if the giving up the possession on the 1st of May, *might* have formed part of the consideration for the arbitrators making the award they did, the award is void; *Seccombe v. Babb (b)*.

BRADY, C. B.

We are of opinion, that this is not an integral part of the award; and

(a) M'CL. & Y. 200.

(b) 6 M. & W. 129.

(c) 1 Jo. 491.

(d) 1 C. & M. 89.

therefore, the question on the Statute of Frauds does not arise. The submission is with respect to the value of certain improvements, the right to the possession being admitted to be in Bellew. The parties have submitted that question to arbitrators, and they were to determine what compensation Bellew was to give to Murphy for the improvements; and in our opinion, the award is perfectly good as to that matter. The arbitrators make an award, and declare the value of the very thing, the value of which was the question submitted to them. No doubt they go on and arbitrate upon a matter about which they had no power to make an award, that is, as to the possession of the premises; but that was a benefit to Murphy; and if they took that matter at all into account in estimating the compensation, it went only in reducing the amount to £107, not in augmenting it. Then having given Murphy the use of the house for a particular time, they award that at the end of that time he should give up the premises, and not injure them in the meantime; but there is nothing in that part of the award to shew that the clause about the possession of the house formed any part of the consideration for making the award. It appears to me that the award is perfectly good for the amount of compensation to be made to the plaintiff.

T. T. 1841.
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MURPHY
v.
BELLEW.

FOSTER, B., and RICHARDS, B., concurred.

Cause shewn allowed, with costs.

ELLEN CONNOR,
Administratrix of DANIEL CONNOR deceased,

v.

PATRICK CONNOR.

Mich. Term.
Nov. 16.

MR. DEANE moved to make absolute a conditional order for entering judgment on a warrant of attorney, executed by defendant to Daniel Connor deceased, and bearing date the 4th August 1831, in the penal sum of £200. The warrant of attorney, which had been given as a collateral security with a mortgage, was in the common printed form authorising certain Attornies to appear for the said Patrick Connor and confess a judgment, &c., "upon a declaration there to be filed against "him upon a bond for £200 sterling, good and lawful money of Ireland, "bearing equal date with these presents, conditioned for the payment of "£100, with interest on," &c.; and concluding with the usual release of

The Court refused to allow judgment to be entered on a warrant of attorney reciting a bond collateral therewith, where in fact no bond had been executed.

M. T. 1841. errors. In point of fact no bond had been executed. There was no appearance on the part of the defendant.

Exch. of Pleas.

CONNOR

v.

CONNOR.

Mr. *Deane*.—Unless the Court grant the application, the plaintiff will be without a remedy ; moreover the motion is not opposed by the only party interested in resisting it.

Per Curiam.

We think this motion ought to be refused. The warrant of attorney contains a recital avowedly unfounded in fact. Had there been a bond collateral with the warrant, there would have been a stamp duty payable upon it ; but if the recital in the warrant were considered equivalent to a bond, it would furnish a ready means of evading the payment of the stamp duty. If this had been a warrant to confess judgment on the covenant contained in the mortgage deed, the case would have been different. Besides, in that case, the judgment would not carry interest ; but here it is sought to obtain a judgment carrying interest on a warrant of attorney containing a false recital. The party is not without a remedy, as she may have an action on the covenant in the mortgage deed.

Motion refused.*

* See *Otway v. Thynne*, 3 Ir. Law Rep. 540, and cases there cited.

ANNA BERESFORD v. HENRY B. BERESFORD.

Nov. 10.

A judgment upon the marriage of the conusee was assigned to the trustees of the marriage settlement, and a memorial of the assignment duly enrolled ; the conusee having married a second time, the judgment was again assigned to the trustees of a second settlement. The personal representative of the surviving trustee of the first settlement having refused to assign the judgment to the surviving trustee of the second ; the Court refused to allow the memorial of the first assignment to be taken off the file, in order that a memorial of the second might be enrolled.

MR. NORMAN applied for an order, that the proper Officer should be at liberty to take the memorial of the assignment of a certain judgment of Trinity Term 1812 off the file, and to receive a new memorial of an assignment from the conusee to one John Stuart, her trustee. The judgment in question was obtained by Anna Beresford against her brother the conusor, and was given to secure her marriage portion. Immediately after the judgment was entered, Anna Beresford intermarried with Charles Gardiner ; and, by marriage settlement then executed, the judgment and monies secured thereby were assigned to Sir George Hill and William Gregory, Esq., upon the usual trusts, and a memorial of the assignment was, in pursuance of the statute, enrolled. Neither of the trustees

Semble—That it was a case for a petition under the 1 W. 4, c. 60.

executed the deed, nor was there any evidence of their having accepted of or interfered in the trusts; and the affidavits to ground the motion stated they never had. Charles Gardiner afterwards died without issue, leaving the said Anna Beresford, then Gardiner, surviving, in whom the absolute interest in the judgment then vested. In 1822, Anna Gardiner again intermarried with Charles E. Stuart, and another settlement was executed, which recited the judgment, and purported to assign the monies due thereon to John J. Hutchinson and John Stuart, as trustees, for the purposes therein mentioned. The trustees named in the first settlement were both dead. Gregory survived, and administration had been taken out to him by C. L. Hunt. The consor was also dead, and his eldest son, having succeeded to the estates bound by the judgment, proposed to pay it off, and applied to Stuart, the surviving trustee of the second settlement, to satisfy the judgment on the roll. Stuart thereupon applied to Hunt, the administrator of Gregory, either to do so or assign the judgment to him; but he refused in any manner to act, and by affidavit disclaimed all interest, &c. It was further stated that there was not any person interested in, or who had a claim upon the monies secured by the judgment, but the persons then before the Court, and the issue of the second marriage; and Mrs. Stuart deposed that she had received the interest due thereon up to January last.

M. T. 1841.
Exch. of Pleas.
 BERESFORD
 v.
 BERESFORD.

Mr. Norman.—The motion is one entirely to the discretion of the Court as regards the custody of its own records; no person can be injured in any way by its being granted; as, in the first place, all the persons interested in the funds had made affidavits in support of the motion; and, at all events, the interest, if any, now outstanding in the personal representative of the surviving trustee in the first settlement, would, at the same moment that the first memorial was vacated, appear on the record in the name of the surviving trustee of the second settlement, who was *de facto* the trustee. The Court of Common Pleas granted a similar application in the case of *Lewis v. Tindall* (a).—[RICHARDS, B. In that case, the trustee disclaimed in his lifetime, but here, it does not appear that there was any renunciation or disclaimer by the trustees during their lives.—BRADY, C. B. Why not proceed under the 1 W. 4, c. 60?—This case is not within the provisions of that statute; for here the trustees never accepted the trusts, and the personal representative has disclaimed; and even upon a bill filed, it would be difficult without the interposition of this Court, to relieve the parties from their present embarrassment.

RICHARDS, B.

I think you will find, upon looking into the cases in which relief has

(a) Cr. & Dix, A. N. C. 437.

M. T. 1841. been granted under the statute, that this case comes within the principle of
Each. of Pleas. some of them ; here, there was no repudiation of the trusts by the trustees
BERESFORD during their lives, and we cannot say that they never assented to the
v. performance of them.
BERESFORD.

Upon a subsequent day Counsel stated that he had not found any case like the present, in which the Court had made an order of reference under the 1 *W. 4*, c. 60 ; that the case nearest to it was that of *Crook, Petitioner, v. Ingoldsbys, Respondent (a)*, where there had been an approval of the trusts and a consent to act in them by the respondent, previous to the testator's death.

RICHARDS, B.

I think the case is within the provisions of the Act ; but even supposing it is not, that cannot affect the present application.

PENNEFATHER, B.

We cannot consent to alter the records in the manner sought. Where a judgment has been assigned to A. and B., it is impossible for the Court to annul that assignment, and direct it to be assigned to C. and D., after the death of A. and B.

BRADY, C. B.

You must either proceed under the Act or file a bill, but we cannot assist you upon this motion.

No rule.

(a) 2 *Ir. Eq. Rep.* 375.

M. T. 1841.
Exch. of Pleas.

THORPE v. HERON.

Nov. 10.

ASSUMPSIT.—On the trial before the Lord Chief Baron, at the Sittings after last Term, it appeared that by a written agreement between the plaintiff and defendant, the former agreed to let to the latter, for the term of five years, a house in Synnot Place, at the yearly rent “of £40 *above taxes*, payable half yearly.” The declaration contained no special count in reference to the taxes, but contained counts upon other portions of the agreement, and the usual money counts. It appeared that the tenant who succeeded the defendant in the occupation of the premises, was called on by the tax collectors to pay, and did accordingly pay, certain taxes, amounting to a sum of £1. 15s. 4d., which had accrued due during the period of the defendant’s tenancy. It further appeared, that for the amount so paid he was allowed credit in his rent by the plaintiff. Upon this evidence Counsel for the plaintiff contended that he was entitled to a verdict for £1. 15s. 4d., on the count for money paid for the defendant’s use, but the Jury, under the Chief Baron’s directions, found a general verdict for the defendant.

The defendant by a written agreement took a house from the plaintiff, at a certain yearly rent “above taxes;” the succeeding tenant having been obliged to pay an arrear of taxes which had accrued due during the period of the defendant’s occupancy, was allowed by the plaintiff to take credit in his rent for the sum so paid:—*Held* that the plaintiff might recover the amount in an action of *indebitatus assumpsit* for money paid to the defendant’s use.

Mr. Keatinge, Q. C., with whom was Mr. Otway, now moved pursuant to leave reserved at the trial, that the verdict had for the defendant might be set aside, and a verdict entered for the plaintiff, on the money counts, for the sum so paid for taxes, or that a new trial should be had. The defendant was clearly bound by the terms of the contract, to pay all taxes becoming due during his tenancy, and the payment of them by the subsequent tenant, for which he was reimbursed by the plaintiff, is clearly a payment by the plaintiff for the use of the defendant, which the former is consequently entitled to recover on the money counts.

Sergeant Greene, with whom was Mr. Baker, *contra*.

Whether the plaintiff be or be not in point of law entitled to recover the amount of the taxes upon a special count framed for that purpose, he cannot recover the amount on the money counts; and here the declaration contains no special count on the contract relating to the taxes. *Spencer v. Parry* (a). To make the party liable, a default on his part must be shewn; but in this case there was no evidence of a demand having been made on the defendant to pay those taxes during his occupancy. The original liability of the defendant, therefore, not being

(a) 3 Ad. & El. 331.

M. T. 1841.
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THORPE

v.

HERON.

proved, the subsequent payment was not to his use, and the action cannot be sustained on the count for money paid. At all events, the plaintiff should have called on the defendant, in the first instance, to pay the taxes, but he did not do so; and the payment by the incoming tenant is voluntary in relation to the defendant. In *Exall v. Partridge* (a), Lord Kenyon says, "Some positions have been stated on the part of the plaintiff to which I cannot assent; it has been said, that where one person is benefited by the payment of money by another, the law raises an *assumpsit* against the former; but that I deny. If that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor, "*volens volens*." There is no privity of contract here between the parties, to raise an *assumpsit*.—[PENNEFATHER, B. The defendant left unpaid what the plaintiff was obliged to pay, that is, left a liability when outgoing, inasmuch as the tax-gatherer might have distrained for the taxes; a circumstance which brings this case within the authority of *Exall v. Partridge* (a).]—No doubt the incoming tenant, who paid on compulsion, might maintain an action, because the payment was compulsory; but on the incoming tenant having paid, the landlord was not bound to allow it.—[*Per Curiam*. We think he was.]—The plaintiff failed to prove that the defendant was primarily liable to pay these taxes, except so far as the words in the contract "above taxes" may constitute such a liability; but that being by force of the contract, the plaintiff could only recover such payments (if at all) on a special count founded on that contract; *Williamson v. Henley* (b); *Spencer v. Parry* (c); *Cooke v. Munstone* (d). And even supposing a primary liability here on the part of the defendant to the payment of these taxes, yet, as it was included in the contract, such liability was merged in the contract, and could, consequently, be recovered on a special count only, and not on the common count for money paid.

Mr. Otway in reply.—On the trial the only question raised was, whether these taxes could be recovered on the money counts; and the general question is not open to the defendant; *Moore v. Eddows* (e): but even if the general question was open, the plaintiff has a right to recover. In *Spencer v. Parry* (e), cited at the other side, the tax was the land tax, to which the plaintiff (the landlord) was primarily liable by law; and but for the contract in that case, the defendant (the tenant) would not have been liable at all. It is evident, therefore, that in that case the plaintiff could only have recovered upon a special count. Besides, the words of the

(a) 8 T. R. 308.

(b) 6 Bing. 229.

(c) 3 Ad. & El. 331.

(d) 1 N. R. 151.

(e) 2 Ad. & El. 133.

contract in this case are, "£40 above taxes." This is merely a statement of a liability which would have necessarily resulted at law, but is not a contract to pay the taxes; and, therefore, a special count could not have been framed upon it. In the case of *Grissel v. Robinson* (a), in which the case of *Spencer v. Parry* (b) was cited, Tindal, C. J., says—"I have always understood "the distinction as to the obligation to sue on the special contract rather "than on the general count to be, that where, at the time of the payment, "any thing remains to be done under the contract, of which the plaintiff "must shew performance, the action should be on the special contract; "but where all has been done, and the plaintiff has only to prove the "payment of the money, then he may sue on the general count, and in "order to recover on that count, the plaintiff must shew an express or "implied assent to the payment of the money, or that it was paid on "compulsion for the use of the defendant." *Adams v. Dansey* (c), *Child v. Morley* (d), *Carter v. Carter* (e), were also cited.

M. T. 1841.

Exch. of Pleas.

THORPE

v.

HERON.

BRADY, C. B.

We think a verdict should be entered for the plaintiff for the amount paid for the taxes. In *Spencer v. Parry* (b) the plaintiff was primarily liable, and the defendant made so only by the contract: here the contract leaves the taxes in the situation of their ordinary liability. The sum paid in this case was for ministers' money, a tax to which the defendant was primarily liable. The plaintiff, therefore, on the money counts, must have a verdict for money paid, but the defendant is entitled to retain his verdict on the special counts.*

(a) 3 Bing. N. C. p. 10.

(b) 3 Ad. & El. 331.

(c) 6 Bing. 506.

(d) 8 T. R. 610.

(e) 5 Bing. 337.

* See *Armstrong and Macartney's N. P. Rep.* 178.

E. T. 1842.
Common Pleas.

R E I D

v.

M I T C H E L L ,

One of the Public Officers of the Belfast Banking Company.

(*Common Pleas.*)

April 26.

An action against a Public Company in the name of their Public Officer, for having falsely, maliciously, and without probable cause, procured the arrest and imprisonment of the plaintiff, cannot be sustained by proof that one of the Directors, who was also general manager of the bank, had acted wilfully and maliciously in the proceedings which formed the subject matter of the arrest, without establishing the concurrence in, or adoption of, his acts by the Company.

The 6 G. 4, c. 42, has made no change in the general law as affecting such an action, beyond allowing the Company to be sued in the name of their Public Officer.

THIS was an action brought by the plaintiff against the Belfast Banking Company, in the name of one of its Public Officers, for falsely, maliciously, and without any probable cause, procuring the arrest and imprisonment of the plaintiff. It appeared in evidence, on the trial before the Lord Chief Justice, that the plaintiff had, on the 20th of March 1839, tendered and obtained discount of a bill for £500 at the bank of the defendants; that Mitchell, who was at that time one of the Directors, and the general manager of the bank, having what he considered strong grounds of suspicion, that the bill in question was a forgery, had the defendant arrested on informations sworn by him before a Magistrate; and having brought him to the bank for examination before the said Magistrate, he was committed to prison on the charge of having offered the aforesaid bill for discount to the Belfast Banking Company, which was discounted for him, and was supposed to be a forgery. The plaintiff was in confinement for three days, and was then discharged from custody by the same Magistrate, upon the grounds of its having been communicated to him by Mitchell, that he had, by sending to Liverpool, discovered the bill to be genuine. It also appeared that Mitchell was one of the Public Officers at the time this action was brought; and that the Company consisted of 275 members, some of whom resided in England, and some in Ireland. It was also proved that the plaintiff had been served with a *cap. ad. resp.* at the suit of the defendants, for the recovery of the amount of the said bill. The defendants had applied at the trial for a nonsuit, on the ground that malice was the gist of the action, and that there was not any evidence to shew that the other members of the Banking Company were privy to the said charge or proceedings, or that they assented thereto. This the Chief Justice refused to grant, and the defendants then, without waiving the exception, went into evidence to prove that there had been a reasonable ground of suspicion against the plaintiff. On the close of the defendants' case, the Counsel for the defendants insisted, that inasmuch as there was not any evidence to shew that the said Company had acted maliciously, and without probable cause, his Lordship should direct the Jury to find a verdict for the Company; but his Lordship refused so to do, and directed them, that if they believed the evidence, the said Company should be held responsible for the charge and proceedings instituted against the plaintiff;

and that if, on the whole of the case, and under all the circumstances, the Jury should believe that the charge was preferred, and the proceedings instituted and carried on by Mitchell honestly, although under a mistake, and for the *bonâ fide* purpose of bringing a supposed offender to justice, they should find a verdict for the Company; but if, on the other hand, they should believe that the said charge and proceedings were merely colourable, and got up for the sinister purpose of extorting restitution for an improvident discount so made to the plaintiff at the bank of the said Company; and that the said charge was wilfully and designedly prosecuted, for the exclusive purpose of obtaining restitution of the money so incautiously advanced to the plaintiff, they should find a verdict for the plaintiff; whereupon the Jury found a verdict for the plaintiff, with £200 damages; and the defendants having taken a bill of exceptions, the same now came on for argument.

E. T. 1842.
Common Pleas.

REID
v.
MITCHELL.

Mr. Napier, in support of the exceptions.—The question for the decision of the Court is, whether the Banking Company is, or is not, collectively liable for the acts of Mitchell, in procuring the arrest and detention of the plaintiff, the Jury having found that the act complained of was malicious, and without probable cause; for, unless liable as a Company, they are not liable at all. By the 17th section of the 6 G. 4, c. 42, a judgment against a Public Officer operates against the Company and property of every individual member of it; and by the 18th section, execution may be issued against any of them; and if ineffectual against such, it may be issued against any subsequent member, not only while a member, but at any time within three years after he has ceased to be so. Such being the effect of a judgment against the Company, can it be contended that the properties of the individual members are to be thus placed at the mercy of one of their Directors doing an illegal, and, therefore, an unauthorised act? It is impossible to sue the Company through their Public Officer, except in cases where every member of it is jointly liable; and assuming, therefore, that Mitchell acted maliciously, and without probable cause in the transaction, is there any evidence, I would ask, transferring the malice from him to the individuals composing the Company, who must have authorised him to make a wilfully false charge against the plaintiff—for otherwise the action could not have been sustained; *Cohen v. Morgan (a)*. Even if the act were one which could be said to be binding on the Company, the mere fact of its having been done by one of the Directors, is not sufficient to render them liable; *Bramah v. Roberts (b)*. Considering him, however, in the light of a servant, there must be some limit to the authority given him by the Company; for if Mitchell had, in endeavouring to recover the discount he had improvidently given to the plaintiff, knocked him down, could it be contended

(a) 6 D. & R. 8.

(b) 5 Scott, 172.

E. T. 1842.
Common Pleas.

REID
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that the bank were liable for such an act? It is laid down by Holt, C. J., in *Middleton v. Fowler* (a), that a master is not chargeable with the acts of his servant, but where he acts in the execution of the authority given to him. This position is cited and approved of by Lord Kenyon in *McManus v. Cricket* (b), where the distinction is taken between the liability of a master for the wilful act of his servant, and an act within the legitimate scope of his authority. The same law is likewise laid down by Tindal, C. J., in *Williams v. Holland* (c). With respect to the peculiar circumstances of the defendants in this case, being a company or co-partnership, the observations of Lord Eldon in the case of *Arbuckle v. Taylor* (d) are precisely in point; where he states it to be “a singular proposition to be contended, that if an individual thinks proper to prosecute for stealing property which belonged to him and other individuals in partnership, and nobody appearing in the prosecution but himself, that because the property is copartnership property, it is, therefore, to be dealt with as a prosecution by all the individuals in partnership.” Before this action can be sustained, it must be shewn, that all the individuals composing this Company were jointly influenced in the act complained of. An acting manager has full power to make contracts in his management of the affairs of the firm; but if he does an act wilfully malicious, they are not liable unless there shall have been some privity proved, or a subsequent assent. They might be liable for negligence, but not for a wilful act, unless, perhaps, they had subsequently concurred in it.

Mr. Rolleston, and Mr. Whiteside, *contra*.

We admit that the Company, whatever may be the number of its members, could not be sued for a malicious act, unless it were proved that they all concurred in it; and it was difficult before the 6 G. 4, c. 42, to bring such an action; but when, as in this case, one of the Directors, put into that office by the Company, and whose duty it was to swear informations, is found acting as Director in the act complained of, for the benefit of the bank, which is empowered by the 10th and 19th sections of the statute to prosecute—it is some evidence that he must be considered as acting with their concurrence, and within the scope of his authority. Moreover, in this instance the plaintiff was brought to the bank for examination, and they adopt the proceedings by suing afterwards on the bill; so that it is quite clear that Mitchell was not acting for himself individually, but for the benefit of the Company. *Arbuckle v. Taylor* does not apply to this case; for the party who there carried on the prosecution was not put into the situation of a Manager and Director by the others, as Mitchell was in this case; and if he had, it would have

(a) Salk. 282.

(e) 3 M. & Scott, 550.

(b) 1 East, 106.

(d) 3 Dow. P. C. 160.

been evidence against all the parties of having invested him with an authority which would render them as, a firm, liable for his acts. This is a case in which express malice cannot be proved, being a case of legal malice, to be inferred, not from a wilful act, but from want of probable cause; and very slight evidence will be sufficient. The Public Officer is empowered by the statute to prosecute for forgeries; and if the principle contended for be law, Companies of this description may be invested with all the privileges and advantages of prosecuting criminally, and yet have it in their power to avoid all the responsibility of such proceedings, by appointing a pauper to be their Public Officer or Director. The only analogous case to the present is that of *Durant v. Potter* (a), which was an action against a Banking Company for maliciously over-marking an execution by the Public Officer, as appears by the record. This question was not, however, raised, the plaintiff having been non-suited on another point; but it is a precedent for the objection not having been made under precisely similar circumstances. The case of *M'Manus v. Cricket* (b) is an authority for us, the Court having held that the master would have been liable in an action on the case, although not in trespass; and here, we admit, that trespass would not lie, the act not having been immediate. And it has been held that a master is even liable for the illegal act of his servant, if done within the scope of his probable authority, and for the master's benefit, as in this instance; *Attorney-General v. Siddon* (c); *Rex v. Fisher* (d); *Rex v. Walter* (e). The action ought to be brought against the party for whose benefit the act was done; *Stone v. Cartwright* (f). It has been even held that a master is liable for the act of a third person, who was not his servant, the injury having been done by reason of his having placed his servant in a position that caused it; *Booth v. Mister* (g); and although the act was done in express contravention of the master's orders; *Sleath v. Wilson* (h). These cases establish the principle, that where the master puts it into his servant's power to do the act complained of, he is responsible; and so, in this instance, the Banking Company are rendered responsible by having placed Mitchell in a situation to do the act complained of; *Morton v. Harden* (i). This Company could bring an action in the name of their Public Officer for a libel against them; *Williams v. Beaumont* (k); and if they can bring an action of libel, why, if the remedy is to be co-extensive, could not an action lie against them for a malicious act? Put the case of a Director committing a fraud:—it will be said, on the principle

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(a) L. & T. 253.

(c) 1 Tyr. 41.

(e) 3 Esp. 21.

(g) 7 C. & P. 66.

(i) 4 B. & C. 223.

(b) Ante.

(d) M. & M. 433.

(f) 6 T. R. 411.

(h) 9 C. & P. 607.

(k) 3 M. & Scott, 706.

E. T. 1842. contended for, that it could not be implied that the Company authorised,
Common Pleas. and that, consequently, they were not bound by, or responsible for, the
 REID act; but the contrary has been decided in *Pendlebury v. Walker (a)*,
 v. where the Company were sued in the name of their Public Officer for
 MITCHELL. a gross fraud on the part of one of the Directors.

Mr. *Tomb*, in reply.—The essence of this action is, that the party did the act complained of maliciously and without probable cause; *Porter v. Weston (b)*; and after the verdict, it must be taken that Mitchell, as a Director, acted maliciously and without probable cause: but so far from the subsequent proceedings of suing on the bill, operating as an adoption by the Company of his acts, they have a direct contrary effect, inasmuch as the bringing of such an action is a repudiation of any forgery having been committed. If all the partners were liable in an action of *tort* for any malicious act done for the benefit of the firm, the consequences would be serious, and it would, moreover, be in direct opposition to legal principle, to analogy, and to authority. In the first place, the consequence would be to render every member of the Company liable to have execution taken out against him, even although not a member at the time of the committing of the act.—[BALL, J. The same might be said if the recovery was on a contract.]—If on a contract there might be contribution, but not in a case of *tort*. No authority can be implied to do a wrongful act, although a master may be held liable for an act of negligence, because he ought to have employed a skilful person. This distinction is established in the cases of *M'Manus v. Cricket (c)* and *Thynne v. Russell (d)*. No doubt, if the Company adopted the prosecution of their Director, and supplied the money for carrying it on, they would be liable for the consequences; but the Court cannot presume the adoption of a wilful and malicious act without evidence—the law only implying authority to do lawful acts. In *Durant v. Potter (e)*, the point could not have arisen, there having been a nonsuit for want of proof of the Public Officer. In *Pendlebury v. Walker (f)*, there was a demurrer to the bill, which, of course, admitted all the facts stated on it, and that the bank had adopted the act of their Director, by taking the benefit of the fraud; and it was necessary to make the Company parties, in order to recover the money. The case of *The Attorney-General v. Siddon (g)* rests on peculiar grounds—the master, being subject to the Excise Laws, was answerable for the act of his servant employed in that particular business, the law implying authority, on the grounds of public policy, from the

(a) 4 Y. & C. 424.

(b) 8 Scott, 37.

(c) Ante.

(d) 1 J. & S. 155.

(e) Ante.

(f) Ante.

(g) Ante.

nature of the trade. The cases of *Rex v. Fisher* (a) and *Rex v. Wal-ter* (b) belong to another class of cases, viz., that of libels in newspapers, where the editor employed to publish is, for the protection of the public, held liable for all such acts. As for authority for our position, the case of *Arbuckle v. Taylor* (c), decided in the House of Lords, is directly in point.

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DOHERTY, C. J.

May 2.

This case was tried in this Court at the Sittings after last Michaelmas Term. It was an action brought against the defendant as one of the Public Officers of a certain company or copartnership, called the Belfast Banking Company, for having falsely, *maliciously*, and without any 'probable cause, caused the plaintiff to be arrested, and detained in custody.

It appeared in evidence that the Belfast Banking Company consisted of 275 members, resident in various parts of the United Kingdom; that the business of the establishment was carried on at Belfast; and that Mr. Mitchell had been, at the time the action was brought, the Public Officer, and a Director of that Company—and as such, it was, that he had caused the plaintiff to be arrested. It is also to be collected from the Judge's charge (to which there was no objection), that the Jury, in effect, found, that Mr. Mitchell's proceedings against the plaintiff had been colourable, and got up for the exclusive purpose of obtaining restitution of money which had been advanced on an improvident discount, and not *bonâ fide* for the purpose of bringing a supposed offender to justice.

The only question raised upon this bill of exceptions is, whether, as the action is brought against the Company in their collective capacity, it is sufficient to establish that one of their Directors acted wilfully and maliciously in the proceedings which formed the subject-matter of the action, without establishing the concurrence in, or adoption of, his acts by the Company.

Two considerations arise in this case—First, could this action have been sustained against all the members of a copartnership, by proof of the acts of one only, without proof of the previous authority of, or subsequent adoption by, the others, independent of the statute 6 G. 4, c. 42? Secondly, has that statute made any alteration in the law in this respect? As to the first consideration, we are of opinion, that there must be evidence of previous authority, or subsequent adoption or assent, to involve persons who have not taken any part in the transaction, where malice forms a necessary ingredient. In this opinion we are borne out by the high authority of Lord Eldon, in the case of *Arbuckle, Appellant; Taylor and others, Respondents*; reported in 3 Dow. P. C. In page 178, his

(a) Ante.

(b) Ante.

(c) Ante.

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Lordship says, "It is a singular thing, to be sure, to be contended, that if
"an individual thinks proper to prosecute for stealing property which
"belonged to that individual and others in copartnership, although
"nobody appears in that prosecution but that individual, yet, because the
"property was the property of the copartnership, it is therefore to be
"dealt with as a prosecution by all the individuals in that partnership."
His Lordship proceeds—"The Court gave Arbuckle an opportunity of
"making out this sort of case—that this was a proceeding on the part of
"the partnership—that William Taylor acted under their directions—
"that all the expense and trouble the party were put to was in conse-
"quence of the conduct of the partnership, and that it was, in truth,
"their prosecution, that is, the prosecution of the Company. It appears,
"however, that there was no possibility of maintaining these facts upon
"looking into the evidence." Accordingly, the judgment in that case
was in conformity with this doctrine. So in the case before us, there is
no ground for saying that Mitchell acted under the directions of the
Banking Company, and that the arrest and detention of the plaintiff was
their act—either done by their authority and direction, or subsequently
assented to, and adopted by them.

Now, as to the second consideration, we do not find that the statute
of 6 G. 4, c. 42, which is an Act for the better regulation of Copartner-
ships of certain Bankers in Ireland, has made any change in the general
law as affecting this action. It has, with respect to it, made no other
change than merely allowing the partnership to sue or be sued in the
name of their Public Officer. We must, therefore,

Allow the exceptions.

May 7.

BLACKWOOD v. JONES.

After plea, a
special case
must be made
for a delivery
of a bill of par-
ticulars. An
affidavit that
they are neces-
sary for the de-
fence, is not
sufficient.

MR. O'HAGAN applied to the Court, that the plaintiff should deliver a bill
of particulars to the defendant. The declaration was filed in Hilary
Term, and the defendant served notice of motion for a bill of particulars,
having pleaded the general issue. It was sworn that the particulars were
necessary for the defence.

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Having pleaded, you must make a special case for the delivery of the
particulars of the plaintiff's demand, before we can grant the motion.

No rule.

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Lessee M'DONALD v. LAWLOR.

May 7.

MR. HAMILTON SMYTHE moved that the Officer should be directed to issue an execution against the defendant for the costs of the cause. The defendant had judgment entered up against him, for not appearing at the trial to confess lease, entry, and ouster; and he was accordingly liable, on the consent rule, for the costs of the *non pros.* and suffering the judgment to be entered against the casual ejector; *Adams Ejectionment*, 262; and an attachment could be issued against him for them. Counsel contended that he was entitled, under the late statute, 3 & 4 Vic. c. 105, s. 27, to get a *fi. fa.*, instead of an attachment. The costs had been certified and demanded, and an order of Court for their payment obtained; and having an order of the Court, that it should have the force of a judgment, follows as a regular consequence. The object and spirit of the statute was to get rid of personal arrest, and to render property liable.

The Court will not order a *fi. fa.* to issue under the 3 & 4 Vic. c. 105, s. 27, for the recovery of costs which the defendant had become liable to pay, by not having appeared at the trial to confess lease, entry, and ouster.

Per Curiam.

When a statute makes a new rule of law, we are not to extend it further than the express words of the enactment. In a case like the present, the defendant is not liable to the costs in a direct way; and we are not, therefore, called on to give the party a wider remedy than he had before.

No rule.

KING and another v. KING.

May 9.

MR. JAMES DOHERTY moved that satisfaction should be entered on the record of the judgment in this case, under the following circumstances: A bond and warrant had been executed in 1819, and a judgment entered up on the same in 1840, against the conusor. One of the conusees had emigrated in 1837, and had not since been heard of; and the entire amount due on the foot of the judgment had been paid to the other conusee. It was alleged, that it would be impossible to serve any notice on the absent conusee, who, it was stated, but not proved, had sold his interest in his judgment to his co-conusee, and who consented to the application.

Satisfaction will not be allowed to be entered on a judgment obtained at the suit of two conusees, on the allegation that the full amount had been paid to one of them, who consented, the other having emigrated

in 1837, and not heard of since.

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We cannot give you any assistance. If your client was satisfied that the whole beneficial interest in the judgment was, at the time of payment, vested in the party to whom it was paid, why does he not produce his evidence of that fact now? If he was not satisfied, his course was to have come into Court and lodged the money, and we should have interfered for his relief. Not having done so, if he labours under any hardship, it has been the result of his own want of caution in the transaction.

No rule.*

* The Court of Common Pleas in England refused, on a similar application, to allow satisfaction to be entered on the roll in a case where four out of five plaintiffs had given their consent, although the fifth plaintiff was resident in America, and could not be found, and his Attorney consented. *Davis and others v. Jones*, 5 Dowl P. C. 503.

Lessee CLOONEY v. Casual Ejector.

April 30.

The Court granted a conditional order under the provisions of 1 G. 4, c. 87, with liberty to serve the same on the party who had taken defence, and on any other persons appearing to take defence, but directed that the said order should be served on the party taking defence as well as on her Attorney. The rule was to shew cause within six days after service.

MR. O'DONNELL applied, under the provisions of the 1 G. 4, c. 87, for a conditional order, that M. M., or any other person or persons who might take defence, should enter into a recognizance, or recognizances, by themselves and two sufficient securities, to pay the costs and damages which might be recovered by the plaintiff in the ejectment, pursuant to the statute. Defence had not been taken by any person except M. M., who was in possession; and Counsel also moved that the service of the order should be substituted on her Attorney. The lease was produced, and the demand of possession and notice to appear had been signed by the executor of the original lessor.

Per Curiam.

You may take the order, with liberty to serve the same on any person appearing to take defence; but as this is not the ordinary case, something being added to the usual order, you must serve the party who has already taken defence, as well as her Attorney. Let the rule be to shew cause within six days after service.

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M'LERNAN v. M'LERNAN.

May 2.

MR. WHITESIDE moved to set aside the judgment and execution in this case. The warrant on which judgment had been entered was attached to, and filed with, the bond; and it empowered the plaintiff to enter up judgment on a declaration or declarations to be filed on a bond for a specific sum, which was the same as the penalty of the bond attached to it. The warrant was executed, but the bond was not.

A judgment having been entered up on a bond and warrant, the latter of which alone was executed, the Court set aside the judgment and execution, without costs.

Mr. *Robert Andrews*, *contra*, contended, that if there were any defect, the release of errors cured it.

The roll was produced, and it appeared that a regular declaration on the bond had been filed.

TORRENS, J.

It is the common practice in England to give a warrant of attorney, on which judgment is at once entered; but it is different in this country, where the form of the action must be regularly commenced by filing a declaration on the bond, and continued by filing a plea of confession. In this case, no declaration could, or rather ought to have been filed, as it appears that the bond not having been executed, there was no instrument in existence on which the plaintiff could have declared. If such a judgment were valid, there would be no necessity for executing a bond in any instance. The judgment must, of course, be set aside; and, in my opinion, it ought to be with costs, as I consider that the records of the Court have been, not to say tampered with, but very improperly used, in putting a declaration on the file which had no foundation in fact, and filing a plea of confession to it.

DOHERTY, C. J.

The opinion of the Court is, that the judgment and execution be set aside, without costs.*

* Vide *Administratrix Connor v. Connor*, ante. p 315.

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SHAW. v. BELCHER.

May 2.

The application for the expenses of a witness under the 54th General Rule, is a Chamber motion, and cannot be moved before the full Court.

MR. CONCANNON, moved on notice, that the plaintiff be allowed the expenses of a witness, under 54th General Rule, to be produced at the trial, to prove the handwriting of the drawer and acceptor of a bill of exchange.

DOHERTY, C. J.

This is, by the terms of the rule which requires the application to be before a Judge, a Chamber motion, and your opponent may be availing himself of the irregularity of your notice of motion to the full Court. You must serve another notice for a motion in Chamber.

Counsel stated, that unless the motion was made in the course of the next day, there would not be sufficient time to get up the witness from the country in time for the trial.

DOHERTY, C. J.

You may, under the circumstances, serve notice of motion in Chamber for to-morrow, stating it to be by the leave of the Court.

RONAYNE v. DOHERTY.

May 5.

In an action of assault and battery, the plaintiff having obtained a verdict with 40s. damages,—the circumstances of the Attorney and his brother having stated that he had been paid his costs, although he now swore that the said statement was untrue,—*Held* sufficient to let in the equities between the parties, and deprive the Attorney of his lien in the judgment for costs.

MR. CHRISTIAN moved to make absolute the conditional order that H. Bagge, the Attorney for the plaintiff, might be at liberty, notwithstanding the insolvency of the plaintiff, to renew and execute against the defendant, the execution which had issued in this cause for the amount of the plaintiff's costs. The action was for an assault and battery, in which there had been a verdict for the plaintiff, with 40s. damages. The plaintiff, who was indebted to the defendant in a larger sum than the amount of the costs, had been discharged as an insolvent debtor, his assignee never having acted; and the Attorney swore that he had never been paid his costs. It was sworn by the defendant that the said Attorney and his brother had stated, on two several occasions, that he had been paid all his costs by the

plaintiff, except a trifle. On the other hand, the Attorney, in his affidavit, admitted having made use of some such expression, but that it was in reply to some taunting and insulting observations made by the defendant; and was not true, as he had never received a farthing of his costs. Counsel insisted that the Attorney's lien was not subject to the equities between the parties, but that he had a property in the judgment, in obtaining which he had expended his money, to the extent of his costs; *Watson v. Marshall* (a); *Stephens v. Weston* (b); and even where the suit had been compounded; *Fleury v. Earl of Meath* (c).

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Mr. *Macdonagh*, *contra*, contended that there were cases in which the Attorney's lien had been held subject to the equitable claims existing between the parties; *Lomas v. Mellon* (d); and that, at all events, his lien was only on the balance; *Lane v. Pearce* (e). He also contended, that the circumstance of the Attorney having admitted, although falsely, that he had been paid his costs, was sufficient to take the case out of the general principle ruled by the later authorities, and the 46th General Rule.

DOHERTY, C. J.

This is an application to the equitable jurisdiction of the Court, for assistance, the party applying not having the power of proceeding without our interference, and to the application for such interference on our part, we are called on to give an answer. We admit, that by the current of the recent authorities, the Attorney has a lien for costs on the judgment he has been instrumental in obtaining; but, on the other hand, there may be circumstances which may prevent the Court from interfering. In this case, there is an admission by the Attorney and by his brother, on two several and distinct occasions, that he had been paid or secured the costs which he asks us to assist him in obtaining; and we avail ourselves of that circumstance to let in the equities between the parties to the action. I may add, that the Court are not sorry in having a ground to avoid being bound, in a case like the present, by the strict rules of the authorities on the subject.

Allow the cause shown.

(a) 1 Bing. N. C. 727.

(b) 3 B. & C. 540.

(c) Al. & Nap. 88.

(d) 5 Moore, 95.

(e) 12 Price, 742.

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WHELAN, in Replevin, v. ANNESLEY.

May 6.

The words "sterling lawful money of Great Britain" in a lease executed before the Currency Act came into operation, may import British currency, if such appears to have been the intention of the parties on the face of the deed itself, without looking beyond it.

The execution of a lease three days before the Currency Act came into operation, and the reservation of the rent in two fractional sums "sterling lawful money of Great Britain," which were equivalent to the decimal sums of £10 and £120 Irish currency, were sufficient indications of the intention of the parties that the rent was to be payable in British currency.

THIS was an action of replevin of a distress for rent due by the plaintiff to the defendant. It was tried before Baron Lefroy at the last Assizes for the County of Cork, when it appeared that the plaintiff held under a lease which purported to bear date the 2nd of January 1826, for the term of three lives and thirty-one years, and in which the rent was reserved in the following terms:—"Yielding and paying therefore and thereout, yearly and every year, during the natural life of Eleanor Trant of Bath, in Great Britain, unto the said Arthur Annesley (the defendant), his heirs and assigns, the yearly rent or sum of £9. 4s. 7d. sterling, of lawful money of Great Britain; and from and after the decease of the said Eleanor Trant, yielding and paying, &c., yearly and every year, during the continuance of the estate or term hereby granted, the yearly rent or sum of £110. 15s. 4d. sterling, of lawful money of Great Britain; the said respective sums, or such of them as shall for the time being be payable by virtue hereof, to be paid and payable by two even and equal half yearly payments, that is to say, on every 1st day of May and 1st day of November in each year, clear over and above all rates, taxes, &c., the first payment of the said hereby reserved yearly rent of £9. 4s. 7d. to be made on the 1st day of May next, and the first payment of the said reserved yearly rent of £110. 15s. 4d. to be paid on such of the said gale days as shall next succeed the day of the decease of the said Eleanor Trant." There were also, in the same lease, clauses of penalties of five shillings sterling, and one pound British sterling for omissions to manure and plant trees according to specified agreements. A draft of the lease was also produced in evidence, in which it appeared that the aforesaid reserved rents had been originally £10 and £120, but were altered to the sums mentioned in the lease itself. The said Eleanor Trant had died some time since, and the rent had been paid in the present currency down to the year 1838. Counsel for the defendant, at the trial, required the learned Baron to direct the Jury to calculate the rent according to the present currency, viz., £110. 15s. 4d., but he refused to do so, and left it to them to say, whether the lease was or was not executed on or after the 5th of January 1826—the day on which the Currency Act (6 G. 4, c. 79) came into operation;—and if they should find that it was executed on or after that day, to calculate the rent in the manner insisted on by the defendant's Counsel; but if executed previous to that day, they were to calculate the rent in late Irish currency, viz., £102. 4s. 11d. The Jury found that the lease was executed on the day it bore date, and the verdict having been accordingly found on the calculation of the yearly

rent being £102. 4s. 11d., the point was saved for the consideration of the Court, whether, even supposing the finding of the Jury to have been correct as to the time of the execution, the rent should not be calculated according to the present currency, in which case the verdict was to be varied, and increased accordingly. A conditional order having been obtained—

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Mr. *Bennett*, Q. C., with whom was Mr. *Collins*, Q. C., and Mr. *Bland*, moved to make the rule absolute.

The question for the Court is, whether, according to the evidence and the law, the verdict had in this case should be entered up in Irish, or in British, currency. The lease was executed between the passing of the Currency Act and the time of its coming into operation—the Act having received the royal assent in June, 1825, and the lease executed on the 2nd of the following January, three days before it was to come into operation, viz. the 5th of January, 1826. This circumstance alone distinguishes this case from any others which can be cited, as there can be no doubt, but that acts done between the passing of an Act of Parliament, and the time of its coming into operation, have been frequently controlled by the provisions of the statute. The Currency Act (6 G. 4, c. 79) provides, that in future, all contracts should be construed according to the currency there laid down, “unless the contrary should be proved to have been the intention of the parties;” and there was nothing in this case to prevent the parties making a settlement in money of Great Britain. Accordingly, the intention of the parties is to be the guide of the decision of the Court, and for that we may look, as in the case of *Wallis v. Brightwell*, (a) *dehors* the instrument. This principle was recognised in the case of *Neville v. Ponsonby* (b), where Woulfe, C. B. in his judgment, states that the House of Lords had decided in *Lansdowne v. Lansdowne* (c), “That in order to ascertain the real meaning of the “contracting parties, it was necessary to look beyond those words into “all the circumstances of the contract.” He also observes, that “The “same observations apply to the case of *Noel v. Rochfort* (d), and to all “similar cases, where the meaning of the contract is gathered from the “particular circumstances which attended it.” In like manner, Foster, B., lays down the same principle, that the words in the lease did not import, in legal parlance, English currency, as distinguished from Irish, “unless “there are particular circumstances in the transaction, as in the case of “*Lansdowne v. Lansdowne*, to shew that the parties so intended it.” (e) Thus, though the words in this lease, viz, “sterling lawful money of

(a) 2 P. Wms. 88.

(b) 1 Ir. Law Rep. 217.

(c) 2 Bligh, O. S. 60.

(d) 10 Bligh, N. S. 524.

(e) p. 227.

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Great Britain," have been construed, in the case of *Neville v. Ponsonby*, to import Irish currency; yet if there are to be found circumstances in the transaction, to shew a contrary intention of the contracting parties, they will be construed accordingly. To shew that it was the intention, in this instance, that the rent should be reserved, and payable in British currency, we have, in the first place, the sums themselves, viz, the two severally reserved rents of £9. 4s. 7d., and £110. 15s. 4d., which are exactly equivalent respectively to round sums of £10, and £120, in Irish currency; and which, when the facts of the Currency Act having passed, and that the first payment was to be made after it came into operation, are taken into consideration, demonstrate beyond a doubt the intention of the parties in the transaction, viz, to reduce the original sums of £10, and £120, which had been agreed on, to the standard of the currency provided by the statute. This is confirmed by the circumstance of the draft lease which was given in evidence, in which the rents appeared to have been altered from the round sums of £10, and £120, to their respective equivalents in British currency. This draft is legitimately useable as evidence to explain the latent ambiguity in the deed, as to the meaning of the words, "sterling lawful money of Great Britain;" for, if not a latent ambiguity, those words should have their literal meaning. We have next the acts of the parties construing their own meaning, the rent not having been paid and received in British currency, from 1826 down to 1838; *Cook v. Booth* (a), *Weld v. Hornby* (b). Thus, by the words of the deed, the intention of the parties, and the obvious justice of the case, we are entitled to have the verdict increased, according to the liberty reserved at the trial. If the circumstances *dehors* the deed to which we have resorted, were called in aid to contradict the deed, we should not be allowed to construe it by them; but it is otherwise where the words of the deed are in our favour, though a different construction may have been given to them in other instances.

Mr. Boyle Keller, and Mr. Pigot, Q. C., *contra*.—The words used in this lease to denote the currency, have received an uniform construction, as importing Irish and not English currency, from the time of the *Mixed Money case* (c), down to that of *Neville v. Ponsonby* (d). In the latter case, Woulfe, C. B., thus expresses himself as to the result of the authorities: "There is no doubt, and it is not disputed at the Bar, that these words, 'lawful money of Great Britain,' have acquired, and have had impressed upon them this signification in all Irish contracts made within the last century. Our courts of justice have acted upon this

(a) Cowp. 819.

(c) Davis's Rep. 72.

(b) 9 East, 195.

(d) Ante.

"understanding, and have given efficacy to bills, bonds, and warrants of Attorney, in which money was described in these terms, as if they "imported Irish and not English currency: they did so deliberately "and uniformly." The cases of *Ladbroke v. Biggs* (a), *Fitzgerald v. Carew* (b), and *Coates v. Cotter* (c), are all of them confirmatory of such having been the legal and unvarying import of these words. As to *Lansdowne v. Lansdowne* (d), it was decided on the ground, that on the face of the instrument it was manifestly an English contract, and to be regulated by the *lex loci*, the law of the country where the contract was made—the parties being all of them resident in England—the money payable at Lincoln's Inn—and the deed executed in London. *Noel v. Rochfort* (e), and *Lord Ormonde v. Cope* (f), were decided on the same ground, so that they can be of no authority in deciding a question raised on a contract admittedly Irish in every respect. Such, therefore, being the fixed legal import of the words in this lease, they ought not to be departed from, as Lord Kenyon has observed, in *Lane v. Earl Stanhope* (g), "Where certain words have obtained a precise technical meaning, we "ought not to give them a different meaning; that would be, as Lord King "and other Judges have said, removing landmarks." The observations of the Master of the Rolls in *Mouncey v. Blamire* (h), are to the same effect. Moreover, to give those words a different construction in this case, would be to repeal and nullify the provisions of the second section of the Currency Act, which provides, that the terms of a contract made before the Act, are to be construed as if the Act had never passed, viz. "In the currency of Ireland, as money shall, before the commencement of the Act, have been valued or named in Ireland." If we can shew a possible state of circumstances, by which the established construction of these words can operate, extrinsic evidence cannot be resorted to, in order to change their usual meaning. Now, admitting the equivalence of the two fractional sums reserved as rent to round numbers in Irish currency, and admitting that there was an intention of the parties to reserve them in British currency, at the time of the alteration of the draft, yet the Court ought to infer the possibility of a subsequent change of that intention, from the very fact of the execution of the lease three days before the day of the Act coming into operation. What more natural than to infer that there was an arrangement of this nature, and a subsequent stipulation for a reduction, which was carried into effect by having the deed executed on the 2nd, instead of the 5th of January?—and any other supposition must rest wholly on conjecture. The case of *Cook v.*

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(a) Batty, 119.

(c) C. & D. 67.

(e) Ante.

(g) 6 T. R. 352.

(b) 1 Ir. Eq. Rep. 346.

(d) Ante.

(f) 3 Law Rec. O. S. 88, 111.

(h) 4 Russ. 384.

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Booth (a), on which the Counsel on the other side have relied for the establishment of the principle, that the sums which the lessee was in the habit of paying, are evidence of the meaning of the contract, has been always received with disapprobation and overruled; *Baynham v. Guy's Hospital (b)*. And the words of the 2nd section of the Currency Act, exclude a reference to the time at which the rent was to be paid, as any guide to the construction of the instrument under which it was payable.

DOHERTY, C. J.

This case comes before the Court pursuant to liberty reserved, on the part of the defendant, by the Judge before whom it was tried at the last Assizes for the county of Cork, that the verdict should be varied and increased, by making it conformable to the sum reserved as rent in the lease, as if the same had been reserved in British, instead of Irish, currency. The circumstances of the case are somewhat peculiar. The lease, on the construction of which the question which we have to decide arises, appears to have been executed on the 2nd of January 1826, three days before the Currency Act (6 G. 4, c. 79) came into operation. On the face of it is reserved, during the life of a person therein named, the annual rent of £9. 4s. 7d., and after her death the yearly rent of £110. 15s. 4d.—both sums being described as “sterling lawful money of Great Britain;” and the question for the decision of the Court is, whether, upon the true construction of this deed, the rent reserved is to be paid in British, or in Irish, currency. Now, it appears, that the Currency Act, before adverted to, received the royal assent in the month of June 1825; and was not to come into operation until the 5th of January 1826. Three days previous to that date, viz. on the 2nd of January 1826, this lease was executed, expressing in its terms that the money was to be payable in British (not in Irish) currency; the rent, too, is reserved in two fractional sums, which are respectively equivalent in Irish currency to the decimal sums of £10 and £120. We are then asked, looking at the deed, and not at any thing *dehors*, to say whether it was the intention of the parties that this rent should be payable in British, or in Irish, currency. Admitting that the whole current of authorities shew, that where the contract was made in Ireland previous to the Currency Act, the use of the words used in this lease—“sterling lawful money of Great Britain”—do not necessarily import the coin of Great Britain, but the same as it was current in Ireland; still here we have, on all the facts and circumstances of this case—adverting to the time at which this deed was executed, the words “sterling lawful money of Great Britain,” and the amount—sufficient to demonstrate that it was the intention of the parties to reserve this rent in British, and not in Irish, currency. When we look in detail

(a) *Ante*.

(b) 3 Ves. 297.

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through the deed, we find other sums reserved, viz. the respective sums of five shillings, and one pound sterling, in British money; and we are called on to give an interpretation to the deed that will have the effect of reducing these sums to Irish currency; although it is obvious, from the amount of the two sums, that they are the representatives in British currency of sums originally fixed in Irish, and which have been already converted into British currency. The true nature of the transaction is so apparent on the face of the instrument, that unless we are fettered by the current of authorities on the subject, we will not give this deed a construction which would be utterly at variance with the manifest intention of the parties. The words "sterling lawful money of Great Britain," taken in conjunction with the amount of the sums reserved, speak the intention of the parties to the deed, that the rent shall be payable in British Currency. We must, therefore, order that the verdict be increased, pursuant to the liberty reserved at the trial.

TORRENS, J.

I concur with my Lord Chief Justice, and would merely add, that the Court is to be understood as resting their decision on the words of the deed itself, and that they do not look to any circumstances beyond it.

FOSTER, J.

I am desirous that it should be clearly understood, that the Court are not to be taken to have expressed any opinion with respect to the provisions of the Currency Act—which is left precisely as it was.

Let the conditional order be made absolute.

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1841.

June 2.

1842.

Jan. 27.

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v.

The Heir and Terretenants of M'CAUSLAND.

The testator having two sons, Robert and Marcus, devised as follows, "I leave and bequeath to my said son Robert, during the term of his natural life, *all my estate, right, title, and interest*, of and to the lands of C., &c.; and in case my son Robert shall marry with the consent of his mother (if living) then I devise the same to any issue he may happen to have by his wife, in such manner as he shall, by deed or will, direct, limit, or appoint; and for want of such appointment, to go equally among them, share and share alike.

But in case my said son Robert shall die *without issue*, then, and in that case, it is my will that the said lands of C., &c., shall go to my son Marcus, his heirs and assigns for ever."—*Held* that Robert

took an estate tail, with a vested remainder in fee to Marcus.

Held, also, that an estate in remainder, after an estate tail in possession, was bound by a judgment, although the same never came into possession of the conusor.

THIS was a *scire facias* which had issued, and was returnable in Trinity Term 1839, to revive a judgment, in which the terretenants were returned as tenants of the lands of Craigarduvarran, of which the conusor (Marcus Langford M'Causland) was seized as of fee at the time of the rendition of the judgment. To this the said terretenants pleaded* (among other pleas) a plea of *non seisin*, on which the plaintiffs took issue, and proceeded to trial at the Spring Assizes for the County of Londonderry, 1841. At the trial, the plaintiffs produced, and read in evidence, the will of Dominick M'Causland, which, amongst others, contained the following clause:—"I leave and bequeath to my son Robert M'Causland, during the term of his natural life, *all my estate, right, title, and interest*, in or to the lands of Craigarduvarran, otherwise Glenmanus, with the toll and mulcture thereof, situate, lying and being in the liberties of Coleraine, and county of Londonderry (one half whereof I purchased from Mrs. S., and the other half I have a right to dispose of under a power in my marriage settlement); and, in case my son Robert shall marry with the consent of his mother (if living), then I devise the same to any issue he may happen to have by his wife, in such manner as he shall by deed or will direct, limit, or appoint; and, for want of such appointment, to go equally among them, share and share alike; but in case my said son Robert shall die *without issue*, then, and in that case, it is my will that the said lands of Craigarduvarran, otherwise Glenmanus, with the toll and mulcture thereto belonging, shall go to my son Marcus Langford M'Causland (the conusor), his heirs and assigns for ever."

The plaintiffs, moreover, proved that the said Dominick M'Causland had the full title and power to dispose of the said lands of Craigarduvarran, as in his said will recited; and also that the said Dominick M'Causland departed this life some time in the year 1806, leaving his two only sons, the aforesaid Robert and Marcus, him surviving; and that the said Marcus Langford M'Causland died in the year 1809, leaving the defendant Marcus M'Causland, his eldest son and heir, him surviving; and that the said Robert M'Causland was the eldest son and heir of the said Dominick M'Causland; and that he, the said Robert M'Causland, died in

* The pleadings in this case are fully set out in 3 Ir. Law Rep. 113.

January 1839, intestate, and without ever having been married, having continued in the possession of the said lands of Craigarduvarran up to the time of his death. And Counsel for the plaintiffs having closed their case, Counsel for the defendants called upon the learned Judge to direct the Jury, if they believed the evidence, to find a verdict for the defendants on the issue, inasmuch as the true construction of the will of Dominick M'Causland was, that Robert M'Causland was entitled to an estate for life, or in tail, with remainder to his issue or children in fee, with remainder, in case he should die without issue or children, to Marcus Langford M'Causland in fee; and that, therefore, the said Marcus Langford M'Causland having died in the lifetime of the said Robert M'Causland, had not any vested estate in fee, nor was he seized in fee of the said remainder, at the time of the rendition of the judgment, or at any time after; but the learned Judge refused so to direct the Jury, and told them that, according to the true construction of the said will, the said Marcus Langford M'Causland having survived the said testator, was seized of a remainder in fee in the said lands of Craigarduvarran, at the time of the rendition of the judgment; and that if the Jury believed the said evidence, and that the testator had the power of disposing of the said lands, as recited in his will, they should find a verdict for the plaintiffs. Whereupon the defendant's Counsel excepted to the said charge, and insisted on the construction of the said will as an absolute bar to the said action, on the plea of *non seisin*. The Jury found for the plaintiffs, and the bill of exceptions now came on for argument.

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Mr. Dominick M'Causland, Mr. Gilmore, Q. C., and Mr. Major, Q. C., in support of the exceptions.*—Our construction of this will is, that Robert took an estate for life, with a contingent remainder in fee to his children as purchasers, in the event of his marrying with his mother's consent—with remainder over, in the event of his not having children of such marriage, to Marcus, the conusor, in fee. This construction would, according to the well established rule laid down in *Lodding v. Kyme* (a), and in *Fearne on Cont. Rem.* 225 (9th ed.), have given the conusor, during the life of Robert, nothing beyond a contingent remainder, which, by reason of his death during the lifetime of Robert, never became a vested remainder, and was therefore never bound by the judgment in question. On the other side, it is contended, that Robert took an estate tail, with a vested remainder in fee to the conusor, which, they say, was bound by the judgment—while we further contend that, even on such a construction, the remainder to the conusor, being only a remainder after an estate tail in possession, was not bound by the judgment.

As to the first question—we contend that the word "issue," in this

(a) 1 Salk. 224.

* This case was argued twice. First, in Trinity Term 1841; and again in Hilary Term 1842.

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will, is a word of purchase, and not of limitation; and that if Robert had happened to have any children by a marriage with consent, they would have taken the whole fee. In the first place, it is not the word "issue" simply that is used, but "any issue he may happen to have *by his wife*," which clearly designate children. But, supposing it were limited to "issue" simply, nothing is better settled than that the word "issue," in a will, is always either a word of purchase or of limitation, as will best effectuate the testator's intention; *Doe dem. Cooper v. Collis* (a); *Roe dem. Dobson v. Green* (b). The meaning and purport of the word "issue," as contrasted with the expression "heirs of the body," is fully discussed by Alderson, B., in the case of *Lees v. Moseley* (c), where he concludes, that "Whatever be the *primâ facie* meaning of the word "'issue' in a will, it is not a technical expression, and will yield to the "intention of the testator, to be collected from the words of the will; "and, therefore, it requires a less demonstrative context to shew the "testator's intention in regard to the word 'issue,' than in regard to the "technical expression 'heirs of the body.'" Now, there are several circumstances in this will which demonstrate the intention of the testator to have been, that the issue should only take as purchasers, in the contingency of Robert marrying with his mother's consent, which event is, therefore, a condition precedent to their taking at all, and quite inconsistent with an estate tail in Robert; *Harvey v. Aston* (d).

1st. The power of appointing the *whole estate* among his issue, which is indicated by the words "all estate, right, title, and interest," which carry the fee to them: *Holdfast v. Marten* (e); *Andrew v. Southouse* (f); *Doe dem. Davy v. Burnsall* (g). The word "estate," by itself, being descriptive either of the local situation, or of the interest in the lands, is an ambiguous term, and has sometimes, on that account, been held not to carry the fee, where it was not clearly the testator's intention to convey *the whole interest*; *Whitelocke v. Heddon* (h); *Doe dem. Bosnall v. Harvey* (i); but in no instance, where it is coupled with the words "right, title and interest," as in this case, have they been held to carry less than the whole interest in the estate. It may be said, that the words "right, title, interest, and estate," will be satisfied by carrying the fee over to Marcus. The words, however, of the will shew that such cannot be the construction; but that it was intended that the whole fee, expressed by these words, should be confined to, and expended on, the issue of Robert; because when the testator comes to give a remainder over to Marcus, he only gives *the land* to Marcus and his heirs.

(a) 4 T. R. 294.

(c) 1 Y. & C. 609.

(e) 1 T. R. 411.

(g) 6 T. R. 30.

(b) 2 Wils. 322.

(d) 1 Atk. 361.

(f) 5 T. R. 292.

(h) 1 Bos. & P. 248.

(i) 4 B. & C. 610.

2nd. The power of distribution “*in such manner*” as Robert should appoint, shews that he had the power of appointing the whole fee; *Rex v. Marquis of Stafford* (a); *Hockley v. Mawbey* (b). The leading case of *Jesson v. Wright* (c) will be relied on, on the other side; but in that case, the words used to designate those who were to take in remainder were, “heirs of the body;” and it was argued by the present Lord Chancellor, Sir Edward Sugden, on the ground that the word “heirs of the body” had a fixed legal signification, so as to take in the whole line of issue. In fact, the whole force of his argument, and of Lord Redesdale’s judgment, was, that the word “heirs” had such force, that a devise to the heirs of a man, without mentioning any estate, carried *per se* the inheritance; and if the word “issue,” which has no such fixed legal or technical signification, had been used in that will, instead of “heirs of the body,” the argument could not have been used. This may be collected, as well from the argument itself, as from the observations of Sir Edward Sugden in his judgment in *Ryan v. Cowley* (d), and also of Alderson, B., in *Lees v. Moseley* (e). Again, Lord Eldon’s judgment in that case was founded on the principle of the general intention prevailing over the particular intention—the general intention having been evidently, that those in remainder should take some estate of inheritance, which had been cut down by the decision in the King’s Bench (*Doe dem. Wright v. Jesson*) to estates for life in the children, by reason of their being no words to carry the inheritance to them. But here we have words that carry the inheritance to those in remainder; and Sir Edward Sugden excepts this very case of ours in the rules of construction which he lays down in his argument in *Jesson v. Wright* (f).—He says, “If words are used which “denote an intention to give the estate to children by purchase, they “shall take in that character, where they can take, by force of the will, “such an estate as will include all the issue;” and in p. 35, he refers to *Doe dem. Davy v. Burnsall*, as an example. His argument, and the decision, in *Wilcox v. Bellaers* (g), are to the same effect. Nothing can be clearer, therefore, than that if there had been words in the limitation in *Jesson v. Wright*, that could have carried the inheritance to those in remainder; or if the word “issue” had been used instead of the words “heirs of the body,” that neither Sugden’s argument could have been made, nor the judgments of Lords Eldon and Redesdale pronounced. The Irish case of *Croly v. Croly* (h), will be relied on, as extending the principle of that decision to cases in which the word “issue” is used, instead of “heirs of the body;” but in that case, it was relied on by Counsel, that there were

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(a) 7 East, 521.

(b) 3 Br. C. C. 82; S. C. 1 Ves. jun. 143.

(c) L. & G. T. S. 7.

(d) Ante.

(e) 5 M. & S. 95.

(f) p. 31.

(g) Turn. & R.

(h) Bat. 1.

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no words to carry the inheritance to the issue in the disputed limitation, who would, therefore, have only taken estates for life, contrary to the obvious intention of the testator. Besides there is, in that case, no power of appointing "in such manner," as the appointer should think fit, which words have been ruled in *Rex v. Marquis of Stafford* (a), sufficient of themselves to carry the fee.

3rd. The clause of the will, limiting the remainder to the issue of an approved marriage alone, is conclusive respecting the word "issue" being taken as a word of purchase:—for, suppose it to be taken as a word of limitation, thereby giving Robert an estate tail, and that he had happened to marry without his mother's consent, and that his wife died, and that he afterwards married with his mother's consent, and died leaving issue male by both marriages; the eldest son of the first marriage will take, on the death of the father, to the postponement of the children of the approved marriage, which would be wholly at variance with the testator's expressed intention. Again, reverse the foregoing proposition, and take it that the first marriage was with consent, and that there was issue a daughter, and that the second marriage was without consent, and the issue of it a son, the construction contended for on the other side would give the estate to the issue of the disapproved marriage, to the exclusion of the issue of the approved marriage, which would also contradict the express will of the testator. Whereas, if our construction be correct, every word of the devise will have its full effect. Robert will take an estate for life, and his issue would take among them "all right, title, interest and estate," in remainder, provided their father had married with his mother's approbation.

Now, if the devise had stopped with the limitation to the issue of Robert, there could not be a doubt but that they must take as purchasers; but it will be contended, that the limitation over of *the lands* to Marcus and to his heirs, in the event of Robert dying without issue, shews an intention on the part of the testator, that the estate should not go over until the whole issue of Robert were extinct; which would give an estate tail, by implication, to Robert. But, in the first place, the words "in case my son Robert should *die without issue*," clearly intend dying without such issue as would take by force of the preceding limitations, viz. the issue of a particular marriage; *Malcolm v. Taylor* (b);—and, in the next place, even supposing that "issue" was used in its most unlimited and general sense, it could only have the effect of giving Robert an estate tail in remainder, without cutting down a previous remainder in fee to the issue of his marriage, provided it were approved of by his mother. It would then be to Robert for life—remainder in fee to the issue of an approved marriage—remainder in tail to Robert—remainder over to Marcus—which would still leave nothing but a contingent remainder in Marcus. It has never yet been

(a) *Ante*.

(b) 2 Russ. & M. 416.

held, that an estate in fee to the issue, has been cut down by an implication of an estate tail in the ancestor ; on the contrary, it has been expressly laid down by Willes, C. J., in the case of *Ginger v. White* (a), that “a pre-“cedent estate devised by express words, cannot be lessened, increased, “or altered, by implication, although it may by express words—a rule of “law which has not been contradicted in any case.” This position is confirmed by several cases; *Doe v. Perryn* (b); *Loddington v. Kyme* (c); *Doe v. Holme* (d); *Goodright v. Dunham* (e). And even where the intermediate estate of inheritance was vested in the issue only by implication; *Merest v. James* (f). In fine, let us look to the leading principle of construction in all cases of wills, viz., the intention of the testator; and we shall find that intention declared in this will, as plain as words can convey an intention—first, that the issue of a marriage by consent were alone to inherit; and second, that they were to take all “right, title, interest, and estate” in the premises. Such being the manifest leading intention—if an estate tail is given to Robert, without limiting a fee to the issue of an approved marriage, both of the express objects of the testator will be defeated, and the sentences expressing the quantity of estate to be vested in the issue, and the necessity of the mother’s approval of the marriage, as well as the words of distribution and appointment by Robert, must be erased from the will. Whereas, on the other hand, if an estate for life, or in tail, be given to Robert, with remainder in fee to the issue, if any, of his marriage, in the event of its being approved of by his mother, with remainder over in the alternative to Marcus, as in the case of *Loddington v. Kyme*, every word of the will has its full force and effect, and the intention of the testator fully carried out—*Harg. But. Co. Litt.* 372, a. vii.; *Mandeville v. Leckey* (g).

But, supposing that the Court should construe this devise as giving Robert an estate tail, with remainder in fee to Marcus, the conusor, this brings us to the second question,* viz., that an estate in remainder, after an estate tail in possession, is not bound by a judgment, unless it come into the possession of the conusor. The rule on the subject is thus laid down in *Shep. Touch.* 360—“Also, a remainder in “tail, or in fee, after an estate tail *in possession*, is not liable to execu-

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(a) Willes, 355.

(b) 3 T. R. 493.

(c) Ante.

(d) 3 Wils. 237.

(e) Doug. 264.

(f) 4 B. Moore, 327.

(g) 3 Ridg. P. C. 353, 365.

* There was some discussion as to whether this point was open for argument on the bill of exceptions; but Counsel contended, that one of the exceptions was, that the Judge should have directed the Jury to find that Marcus, the conusor, was not seized in fee of the remainder at the time of the rendition of the judgment, or after—which was the point to be argued :—on which he was permitted to proceed.

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"tion in these cases, except it happen to come into possession of the "conusor." There are plenty of authorities to shew that a judgment will attach on a remainder expectant on estates for lives or years in possession, but not one to shew that a judgment will attach on a remainder expectant on an estate tail in possession. The estate, in this case, was an estate tail in possession in Robert during the life of the conusor; and before the statute *de donis* it was a conditional fee simple, the donor having no estate left in him, but something in the nature of a right of re-entry, in the event of no issue of the donee. The effect of the statute has been only to make that inalienable from the right issue; but it has not given back to the donor that which was not in him before. That which is now called a reversion, was exactly similar to the kind of interest which was in the donor prior to the statute, and was considered to be of no value, or account, in the contemplation of law; *Co. Lit.* 173, a; and in practice, after the invention of recoveries, it was of as little value. In confirmation of this view, Lee, C. J., in the case of *Martin dem. Tregonwell v. Strachan* (a), observes, "That Parliament (in 26 Hen. 8, "c. 13) has considered a tenant in tail as owner of the whole fee. What "is called an estate tail is still a *fee conditional* as before the Act, and "the same estate in the eye of the law has continued; and that it is "considered in the nature of a fee is proved from hence, that such a "tenant may exchange with tenant in fee; *Salk.* 620; 1 *Roll. Ab.* 813, "pl. 7, 10, 11, is to the same purpose." If, therefore, the whole fee is to be considered as in Robert, there was nothing in Marcus of which he could be said to have been seized, as stated in the plea, during Robert's life; and nothing, therefore, on which a judgment could be said to attach. The case of *Giffard v. Barber* (b), which will be relied on by the other side, does not interfere with, or shake, the proposition laid down in *Shep. Touchstone*, inasmuch as it cannot be collected from the report, that any of the children survived Sir George Carey, the tenant for life; and, therefore, it does not appear that there ever was an estate tail in possession preceding the remainder. The case of *Tyndale v. Warre* (c) was the case of a bond in which the heir was bound, and is therefore altogether inapplicable. In all the text-books, such as *Bacon's Abridgement*, *Comyn's Digest*, &c., it is stated, under the title *Execution*, that a judgment will attach on a reversion after an estate for life or years, but in none of them is any thing said of its attaching on a reversion after an estate tail. It is also remarkable, that in no place is it laid down, that in such a case can you plead, as pleaded here, *seizin as of fee*, although that plea is stated in all the books as proper to be pleaded, in cases of reversions dependent on an estate for years, and on estates for lives.

(a) 5 T. R. 109, n.

(b) 4 Vin. Ab. 452.

(c) Jac. 212.

Plowd. 191. These facts, although negative, are strongly confirmatory of our position, and of the truth of the principle laid down in *Sheppard's Touchstone*.

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Mr. *Sproule*, and Mr. *John Brooke*, Q. C., *contra*.—We admit that the real question for the Court is, whether the issue of Robert took by purchase or by descent. We say they took by descent, on the principle, that when an ancestor takes a life estate, with a remainder over to his issue, in such words as would give the issue an estate in fee, or in tail, the remainder coalesces with the ancestor's estate, and gives him an estate tail, *Roe dem. Dobson v. Green* (a); *Frank v. Stovin* (b); *Robinson v. Robinson* (c); *King v. Melling* (d). Now, we contend that there is nothing in this devise to take the case out of this general rule. That the words of tenancy in common, and distribution, share and share alike among the issue, has not that effect, has been ruled in many cases, *King v. Burchell* (e); *Doe dem. Blandford v. Applin* (f); *Doe dem. Cock v. Cooper* (g). In all these cases, it was held, notwithstanding words of distribution among the issue, to be an estate tail in the first taker. Next, the case of *Jesson v. Wright* (h) has finally settled that the power of appointment vested in Robert, has not the effect of making the issue take as purchasers. That case is stronger in every particular than ours, with the exception of the words, "heirs of the body," having been used instead of "issue;" but in the case of *Croly v. Croly* (i), the King's Bench in this country decided, on a similar devise, in which the word "issue" was used, instead of "heirs of his body," that the first taker took an estate tail, thereby establishing, that whether the devise in remainder is to the "issue," or to the "heirs of the body," makes no difference. That case, and the case of *Irwin v. Cuffe* (k), decided in the Exchequer, carry out *Jesson v. Wright* to its necessary consequences, and establish the principle, that a power of distribution among the "issue," as well as among the "heirs of the body," do not prevent an estate tail vesting in the first taker. *Hockley v. Mawbey* (l), relied on by the other side, was prior to, and is inconsistent with, the case of *Jesson v. Wright*, and its authority was doubted* by

(a) 2 Wils. 322.

(c) 1 Burr. 38.

(e) Amb. 379.

(g) 1 East, 229.

(i) Ante.

(b) 3 East, 548.

(d) 1 Vent. 225.

(f) 4 T. R. 82.

(h) Ante.

(k) Hayes, 30.

(l) Ante.

* The case of *Hockley v. Mawbey* has been fully recognised, and acted on as an authority, by Lord Plunket, in the late case of *Keating v. Keating*, L. & G. tem. Plunk. 294, and by Baron Alderson, in *Lees v. Moscley*, 1 Y. & C. 610.

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Pennefather B., in *Irwin v. Cuffe*. As to the word "estate," we admit that it will carry the fee; but we deny that it is more uncontrollable than a limitation to A. and his heirs; and a devise to A., with remainder to his issue and their heirs, has been held to give A. an estate tail; *Frank v. Stoven* (a); *Goodright v. Pullen* (b); *Hodgson v. Merest* (c). It must be admitted, therefore, that if the limitation were to Robert for life, with remainder to his issue and their heirs, share and share alike, that my argument would be right; but then they say, that the word "estate" being used, it carries the fee, which cannot be cut down; whereas, we contend, that the fact of there being limitations over, shews an intention on the part of the testator that the whole fee should not be expended on the issue of Robert; *Doe dem. Bonsall v. Harvey* (d). In that case, as in this, the word "estate" was used, and it was held not to carry the fee, as it would have had the effect of defeating all the subsequent limitations, contrary to the intention of the testator. The word "estate" does not necessarily mean that the whole should go to the first persons to whom it is limited; *Manning v. Moore* (e). It is then argued that this case differs from all the other cases which have been cited, in the limitation being to the issue of a particular marriage, viz., a marriage with consent. No precedent has been cited to sustain the distinction between a power to appoint among such alone, and among the issue in general; and we do not see how any such distinction can be maintained. The gift over is in default of issue generally, and not of *such* issue. The words "dying without issue" mean an indefinite failure of issue; 2 *Pow. on Devises*, 565. There are two meanings for the word "issue," viz., either the whole line of issue, or children; but its proper meaning in a will is a word of limitation. If, therefore, it should be held, in this devise, to mean children, grandchildren could not take; so that if Robert had happened to have had a dozen of children, and survived them all, none of the children could have inherited, for he would have died without children, and the estate must have gone over accordingly. Any other construction than that which gives Robert an estate tail, would necessarily imply that the word "issue" had two distinct meanings in this will. In many of the cases cited on the other side there was no devise over; and in others, such as *Doe dem. Davy v. Burnsall* (f) and *Lees v. Moseley* (g), some qualifying words, that cut down the general meaning of the word "issue," such as dying under the age of twenty-one years, shewing that an indefinite failure of issue was not intended; or some context to shew that children were designated, as in the cases of *Goodright v. Dunham* (h) and *Ryan v. Cowley* (i).

(a) 3 East, 548.

(c) 9 Price, 566.

(e) Al. & Nap. 96

(g) Ante.

(b) 2 Lord Raym. 1437.

(d) 4 B. & C. 610.

(f) Ante.

(i) Ante.

(h) Ante.

These circumstances distinguish those cases from the present, in which there is nothing on the face of the will to limit the word "issue."—[BALL, J. Should you not apply yourself to the general construction of the will, to ascertain the intention of the testator? We have an obvious intention not to entail the estate on his second son, by having given him the fee; why, then, should we conclude that there was any intention to make the first son the stock of an inheritance? If such were not the intention, the principle of *Robinson v. Robinson* (a), and the similar cases, cannot be said to apply to this will.]—We have it on the record, that the testator had only two sons; and it was, therefore, natural that he should leave the whole estate to his second son, in the event of a failure of issue in the first. Nothing, therefore, can be collected with regard to intention from that circumstance.

As to the other point—if Marcus had a vested remainder in fee after an estate tail, the judgment bound it. The common practice of a tenant in tail, who was desirous of acquiring the fee divested of the encumbrances of those in reversion or remainder, suffering a recovery, instead of levying a fine, with that very object, settles the question. The dictum in *Sheppard's Touchstone* is directly controverted by the case of *Giffard v. Barber* (b), which is recognised, and approved of, in Sergeant Williams' note to the case of *Jefferson v. Morton*, 2 Wms. Saund. 8 h; and the reason which Lord Hardwicke gives for his judgment shews that it is precisely applicable to this case—"because (he says) being the estate of inheritance of G. C., he might grant, encumber, or lease it for any number of years, or charge it by a judgment or statute." All the authorities on the subject are collected in *Tyndale v. Warre* (c), which has decided that a reversion expectant on an estate tail may be sold for payment of specialty debts, which fully corroborates the principle ruled in *Giffard v. Barber*.

DOHERTY, C. J.

This case comes before the Court on a bill of exceptions, taken to the opinion of the Lord Chief Baron as to the construction of the will of the late Dominick M'Causland. The question arises chiefly on the following clause in that will.—[Reads the clause.]—Dominick M'Causland, the testator, died in 1806, leaving his sons Robert and Marcus him surviving. Marcus died in the year 1809, leaving his eldest son and heir Marcus, the defendant in this action, him surviving. Robert, the eldest son of the testator, died in 1839, intestate and without leaving issue. He continued in possession of the lands of Craigarduvarran up to the time of his death. A judgment was recovered against Marcus (the son of the testator) in his lifetime, and proceedings by *scire facias* to revive this judgment

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(a) Ante.

(b) Ante.

(c) Ante.

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having been instituted against Marcus, his heir, and the terretenants, a plea of *non seisin* was put in by the terretenants, upon which issue was joined, and upon the trial of that issue the question was raised, whether Marcus (the son of the testator) was, under the will of his father, seized of an estate in the said lands of Craigarduvarran, upon which the judgment could attach. The learned Judge before whom the case was tried gave it as his opinion, that Marcus (the son of the testator) was seized of a remainder in fee in the lands, at the time of the rendition of the judgment, and that, therefore, the issue on the plea of *non seisin* should be found against the defendants. To that opinion an exception was taken by the defendants, whereby they insisted that, upon the true construction of the will of Dominick M'Causland, his son Robert was entitled to an estate for life, or in tail, with remainder to his issue, or children, in fee—with remainder, in case he should die without issue, or children, to Marcus Langford M'Causland in fee; and that Marcus having died in the lifetime of Robert, had not any vested estate in fee, and was not seized in fee of the said remainder, at the time of the rendition of the judgment, or at any time after.

The question for our decision appears thus to turn upon the consideration of what estate Robert M'Causland and his issue took under the will; and upon that will depend whether or not Marcus, the conusor of the judgment, had a vested estate in fee on which the judgment could attach. Now, without going in detail through the numerous authorities which have been cited in the argument in this case, almost all of which authorities are referred to in *Doe dem. Bonsall v. Harvey*, it may be sufficient for the decision of this case, to state, that it has been the object of the Court to discover, what is the general intention of the testator in making the devise; and we think the words here used by the testator intimate a general intention that the estate should not go over to his son Marcus, until after an indefinite failure of issue in Robert. This being so, we only follow the general current of decisions from *Robinson v. Robinson* to *Jesson v. Wright*, in holding an estate tail to be vested in Robert, disembarassed of any of the objections which have been urged as arising from the use of the word "estate"—the marriage by consent—or the power of appointment given him amongst his issue. For being satisfied, as we are, that it was the general intention of the testator to give to Robert an estate tail, we are of opinion, that in order to cut down that estate, it would, in the words of Lord Eldon in *Jesson v. Wright*, "be absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed." The words (he adds) to alter the general intent so collected, "must be clearly intelligible and unequivocal." Now, as we find no such clear and unequivocal expressions in this will, we must abide by the rule that the general intent must prevail; and this being so, we are of opinion that Robert took an

estate tail, with a vested remainder in fee to Marcus, and that upon that remainder the judgment in this case attached.

Although, as I have already announced, we do not deem it necessary to observe on all the numerous cases which have been referred to in the course of the argument, yet there are one or two which require particular notice. The case of *The King v. Marquis of Stafford* was relied on by the defendant's Counsel, as shewing that under a power to appoint to issue "in such manner and form" as the parent should think fit, a fee might be appointed to the issue; and the equivalent words "in such manner" being contained in the power of appointment in this case, and the testator's son Robert being thus empowered to appoint a fee, it was argued, that it is reasonable to infer an intention in the testator, that the estate to be taken by the issue in default of appointment, shall be estates in fee also. Now, we consider that case distinguishable from the present in this respect, that instead of there being, as here, a general intention apparent on the will, to give an estate tail to the issue, there was there a general intention apparent to give them a fee. "The words of the will (says Lord Ellenborough in pronouncing judgment) according to the common and "ordinary use of them, most distinctly give a fee." He then proceeds to hold, that in such a case a power to appoint "in such manner and form" as the parent shall think fit, authorises him to appoint a fee;—whereas here, having ascertained the general intent to have been, to give an estate tail, we are bound to hold *that* general intent to be unaffected by the particular intent (even if it exists), to empower Robert to defeat the former by appointing in fee.

We were pressed with the doctrine, that the use of the word "estate," in conjunction with the words "right, title, and interest," which were in the devise to the issue, was tantamount to a devise to the issue and their heirs; and, according to the case of *Lees v. Moseley*, such a devise carries the fee to the issue. In that case, however, the devise was to the issue and "their *respective* heirs"—terms in their own nature importing an estate in fee, and shewing a general intention to confer such an estate; and the Court held that there was nothing in the will to conntervail that general intent.

Then as to the use of the word "estate," the case of *Doe dem. Bonsall v. Harvey* is an authority to shew, that although this word may often import a fee, without superadded words of limitation being annexed to the object of the devise; yet, where the testator ultimately disposes of the whole fee, the word "estate" may thereby be satisfied, and it is not necessary to hold that by force of this word, the fee is carried to any of the intermediate devisees. Now, to apply this here, the fee is ultimately limited to the testator's son Marcus, which, according to *Doe dem. Bonsall v. Harvey*, satisfies the word "estate," making it unnecessary to

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hold that it carried the fee to the issue of Robert, or that the general intent of the testator to create an entail in his son Robert, should be defeated by the use of this word.

Finally, it was relied on, on behalf of the defendants, that even supposing the plaintiff's construction of the will to be established, that is to say, that Robert took an estate tail, with remainder to Marcus in fee, yet, that as the remainder in fee was after an estate tail in possession, the judgment against Marcus did not attach upon it. This point was argued without objection on the part of the plaintiffs, although upon the bill of exceptions we do not consider that it was open to the defendants to raise it; yet, even if it were, the case of *Giffard v. Barber*, cited from *Viner's Abridgement*, appears to us to answer the objection. The exceptions, therefore, must be overruled, and judgment entered up for the plaintiffs.

Overrule the exceptions.

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(*Queen's Bench.*)

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April 16.

MR. ARMSTRONG, Q. C., appeared and stated that he had obtained, in the previous Term, a conditional order to set aside a verdict; that an affidavit had been filed on the other side, but no person having appeared to shew cause against the conditional order, he now applied to the Court to have it made absolute.

Where an affidavit has been filed as cause against a conditional order, but no Counsel appeared to shew cause, the Court will not, without notice to the opposite party, make the order absolute.

Per Curiam.

We cannot grant your motion until you have served notice for that purpose; but we will strike out the case, with costs, leaving it to the opposite party to take any further proceeding they may think proper.

THOMAS SAVAGE,
Lessee of WILLIAM DAVIS and ELIZABETH DAVIS,
v.
ROBERT DAVIS.

April 20.
May 2.

EJECTMENT on the title. This case was tried before Pennefather, B., at the last Summer Assizes of the county of Wexford. From the evidence given on behalf of the plaintiff, it appeared, that by lease bearing date the 1st of December 1827, James Browne demised certain lands to John Davis, his heirs, &c., for a life still subsisting and a term of seventeen years concurrent, which lease contained the following clause:—"Provided always, and these presents are on this express condition, and "it is hereby declared and agreed by and between the said parties hereto,

In 1827, A. demised certain lands to B.—*habendum* for one life and twenty-one years. The lease contained a proviso that if B., his heirs, &c., should assign or sublet without consent, under the

hand and seal of A., his heirs or assigns, the lease should, at the election of A., his heirs, &c., be utterly void. B., in 1829, by indenture, in consideration of a marriage between C. and E. and of the sum of £30 as a marriage portion, conveyed said lands in these words: "Hath granted, bargained, sold and confirmed, and doth grant, bargain and confirm unto C., his well-beloved son, the full one-half of said lands; the one-half of said lands to be held and enjoyed during the life of B. and M. his wife; but when it may please God to call the said B. and M., then, at their death, the whole farm to devolve to C., his heirs, &c." This indenture was executed in the interval between the two Subletting Acts, and without the consent of the lessor, but it was subsequently ratified by his heir. The heir was a minor at the time he ratified:—*Held*, first, that the deed of 1829 was valid as a *covenant to stand seized*. *Held*, secondly, that the assignment was void under the operation of the Subletting Act, unless confirmed by landlord, his heirs, &c. *Held*, thirdly, that under the provisions of 7 G. 4, c. 29, the ratification by the heir, although a minor at the time of the ratification, was sufficient.

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“that if the said John Davis, his heirs, &c., do or shall, at any time
 “during the said term hereby demised, give, grant, demise, let, sell, assign,
 “set over, mortgage or otherwise part with, or cause or procure to be
 “given, granted, demised, let, assigned, sold or set over, or otherwise
 “parted with, either by act, deed, permission or sufferance, or by act or
 “operation of Law, the present indenture of lease, or the premises
 “thereby demised, or any part thereof, or his or their estate, term or
 “interest therein, unto any person or persons whatsoever, without the
 “special license or consent of the said James Browne, his heirs and
 “assigns first had and obtained under his or their hand and seal for that
 “purpose; then and in such case, these presents and the grant or demise
 “hereby or intended to be hereby made, and the estate and interest
 “intended to be hereby granted, shall, at the election of the said James
 “Browne, his heirs or assigns, immediately thereupon cease, determine,
 “and be utterly void to all intents and purposes whatever; and it shall
 “be lawful for the said James Browne, his heirs and assigns, from thence-
 “forth and immediately thereafter in and upon the said premises, or any
 “part thereof in the name of the whole, to re-enter, and the same to
 “have again, re-possess and enjoy as if these presents had not been made,
 “any thing herein contained or implied to the contrary thereof in any-
 “wise notwithstanding.”

By indenture bearing date the 2nd of December 1829, being a settle-
 ment executed on the marriage of William Davis and Elizabeth Leeson,
 the lessors of the plaintiff, after reciting the said lease, it was witnessed,
 in consideration of a marriage intended to be solemnized between the
 said William Davis and Elizabeth Leeson, and in consideration of the sum
 of £30 as a marriage portion, the said John Davis hath granted, bar-
 gained, sold and confirmed, and did grant, bargain, sell and confirm to the
 said William Davis, his well beloved son, the full one-half of the said
 lands: the one-half of said land to be held and enjoyed during the
 natural life of the said John Davis, and also the natural life of Mary
 Davis, wife of the said John Davis; but when it may so please God to
 call the said John Davis and the said Mary Davis, then, at their death,
 the whole farm already mentioned to devolve to him the said William
 Davis, his wife, his heirs, executors, administrators and assigns, during the
 term of said lease, viz., twenty-one years or during the natural life of
 John Godkin, the life specified in said lease. This settlement was exe-
 cuted without the consent of James Browne, which consent was requisite
 by the non-alienation clause in the lease of 1827; but the following
 indorsement by the son and heir of James Browne, the lessor, appeared
 on the settlement:—“I, Joseph Browne, eldest son and heir-at-law of
 “James Browne, late of Knocklow, deceased, the lessor in a certain lease
 “bearing date September 1st 1827, made between said James Browne
 “of the one part, and John Davis, of the other part and which lease is

"recited in the within deed, do hereby consent to the assignment or sub-
 "letting of said lands within mentioned, and in manner within mentioned,
 "and do hereby ratify such assignment or subletting as aforesaid, testified
 "by my signing and sealing hereof, this 3rd day of January 1840.

(Signed)

"J. BROWNE."

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It further appeared that Joseph Browne, at the time of the execution of this indorsement, was a minor; and that John Davis, the lessor in the original lease, and Mary Davis his wife, were both dead. The lessors of the plaintiff were in possession of one moiety of the lands under the deed of 1829; and upon the decease of John Davis and his wife, they had brought this ejectment for the other moiety.

The plaintiffs having closed their case, Counsel for the defendant called upon the learned Judge to nonsuit the plaintiffs or to direct a verdict for the defendant; first, upon the ground that the settlement of September 1829 not containing a recital of lease for a year, and being otherwise informal, did not pass a freehold, and that, therefore, the lessors of the plaintiff took nothing under it; secondly, that the lease of the 1st of September 1827 was made in the interval between the two Sub-letting Acts, and as it contained a clause against alienation, save with consent as therein mentioned; and the settlement on the marriage of William Davis and Elizabeth Leeson being executed without the consent of the landlord—the ratification of Joseph Browne having been subsequently obtained, and whilst he was a minor, and, therefore, incapable of confirming the settlement,—that the settlement was void. The learned Judge refused to nonsuit the plaintiff, or direct a verdict for the defendant, but directed the Jury to find a verdict for the plaintiff, by consent, reserving liberty for the defendant to have it set aside and a nonsuit entered, or a verdict for the defendant if the points should be ruled in his favour.

A conditional order for that purpose having been obtained by Counsel for the defendant in last Michaelmas Term,—

Mr. *Hatchell*, Q. C., with whom was Mr. *Swan*, now shewed cause.—As to the first objection, admitting that this deed cannot operate to pass the freehold by lease and release, it not containing a lease for a year, yet it is good as a covenant to stand seized; it purports to be a contract in consideration of marriage and blood,—and also for a money consideration; this is sufficient to pass the estate to the uses of the grantees. The word *grant* will also operate to pass the estate as a covenant to stand seized. As to the second objection, whether the deed of 1829 was a breach of the clause against sub-letting in the lease of 1827, it is contended that there has been a forfeiture of this lease by the deed of 1829, that deed having been executed without the consent of the lessor; but this objection is of no force, for the landlord has received rent from the

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grantees named in the deed of 1829, which is a sufficient assent within the terms of the proviso; and the subsequent ratification by his son and heir-at-law, strengthens that presumption. But, even supposing the objection valid, the landlord is the only person who can take advantage of it; it is a voidable act and not absolutely void, for it can only be avoided by the act of the lessor if he elect to do so, therefore, until he make this election, this assignment must stand good; *Doz dem. Bryan v. Banks (a)*. As to the objection, that this assignment is contrary to the provisions of the Sub-letting Acts,* this deed, having been executed in the interval between the passing of the two Sub-letting Acts, is subject to the provisions of the first Act, for section 10 of the latter Act provides that all leases executed during that period shall be subject to the provisions of the former Act. The 3rd section of the first Act † provides two modes for making valid such assignment, either by the landlord or his heirs, &c., being a party to such deed, or by his or their indorsement on such deed, ratifying or confirming the same; this last provision of the Act has been

(a) 4 B. & Al. 401.

* 7 G. 4, c. 29; 2 W. 4. c. 17.

† 7 G. 4, c. 29, s. 3, enacts—"That where lands or tenements in Ireland shall be held by virtue of any lease or agreement for a lease, which shall be executed or entered into at any time after the first of June 1826, not containing a clause expressly authorising and empowering the lessee or tenant to assign or sub-let (other than a lease for a term of ninety-nine years or upwards, or a lease for lives or years with a covenant for perpetual renewal, or a lease held immediately under any persons or bodies corporate or ecclesiastical, or held under any person or persons deriving from the immediate lessee of such persons or bodies corporate or ecclesiastical, with a *toties quoties* covenant for renewal), it shall not be lawful for such lessee or tenant, his or their heirs, executors, administrators, or assigns to assign or sub-let, either by written instrument or otherwise, any such lands or tenements, or any part thereof, without the express consent of the lessor or contracting party in such lease or contract, his or their heirs, executors, administrators, or assigns, testified;—where such assignment or sub-letting shall be by deed or written instrument, or by his or their being a party to and signing and sealing such deed or written instrument, or by his or their written indorsement on such deed or instrument, ratifying or confirming the same; or where such assignment or sub-letting shall not be by deed or written instrument, testified by his or their consent in writing; and every such assignment or sub-letting, and every lease, deed or instrument, or other agreement or proceeding, whereby such assignment or sub-letting shall be made without such consent as aforesaid, and testified as aforesaid, shall be and be deemed wholly void and invalid to all intents and purposes whatsoever; any law, statute, or usage to the contrary in anywise notwithstanding, unless such consent shall be endorsed or executed in writing as aforesaid; and that in any proceeding in Law or Equity relating to such assignment or sub-letting, the party so assigning or sub-letting, or the party to whom such assigning or sub-letting shall be made, or attempted to be made, shall not be entitled to avail himself of any construction or parol waiver of the benefit of this Act, by or on behalf of such lessor or contracting party.

complied with, for we have the ratification by indorsement, confirming what has been already done. But then, it is said, that supposing an indorsement by the heir of the lessor were a sufficient ratification under the provisions of this Act, yet he being an infant at the time when he executed such deed, it was absolutely void: although an infant cannot do any act to his disadvantage, yet he may execute a lease which would be for his benefit, and such will not be void, but merely voidable at his election; *Ketsey's case* (a); *Zouch v. Parsons* (b). In *Com Dig.* tit. *Infant*, c. 2, it is laid down that a lessee cannot in any case avoid a lease on account of the lessor's infancy, therefore not void: if, therefore, an infant can execute a lease, he may also confirm it; and the lessee or person claiming under him cannot object.

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Mr. Brewster, Q. C., and Mr. George, contra.—This ejectment has been brought to recover a moiety of the lands contained in the lease of 1827: as to the other moiety there is no dispute; it passed to the lessors of the plaintiff by the words of the deed, which, as to that moiety, are sufficient to operate as a covenant to stand seized: we do not contend that the word "*grant*" is not sufficient for that purpose, but "*grant*" is confined expressly to that moiety; for, in the first part of the deed, John Davis in consideration, &c., *grants*, &c., one moiety to William Davis (the lessor of the plaintiff); and after the decease of John Davis and wife, the whole farm is to "*devolve*" to him, the said William Davis, his wife, heirs, executors, administrators and assigns. On this latter clause, the lessors of the plaintiff claim to be entitled to the entire of the lands; now, the word "*devolve*" cannot pass any title to the estate; it is not a covenant, nor a grant; it amounts to nothing but an equitable contract, if any thing at all; it passes no estate to entitle a party to bring an ejectment; and, so far as the term for years is concerned, there can be no covenant to stand seized, for the Statute of Uses will not execute it. The next question arises upon the first Sub-letting Act, and under that Act, we contend, this assignment is absolutely void. The argument on the other side, that by the stipulations in the lease it could only be avoided at the election of the lessor, can have no force, for these words cannot vary the Act of Parliament; for if this assignment could only be avoided by the election of the landlord, according to the terms of the proviso, the rights of the tenant would be thereby enlarged—contrary to the provisions of the Act, which clearly incapacitated the tenant from assigning. This case, therefore, may be argued on the provisions of the Act, independent of this proviso. The third section of that Act precludes the tenant assigning or subletting, unless the lease contain a clause expressly authorising him so to do: this lease gives no such authority, and

(a) Cro. Jac. 320.

(b) 3 Burr. 1794.

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no acquiescence of the landlord, by receipt of rent or otherwise, will amount to a waiver of the provisions of the statute; *Troy v. Kirk* (a). It was not the policy of the law to make such assignments voidable, but that they should be totally inoperative. But assuming the assignment here was only voidable, has there been such a ratification of it, as the Legislature contemplated? To make it such a ratification, the Act must be one that will completely ratify and confirm; it must be *ejusdem generis* with the consent; both must be positive Acts. The infant here may avoid this Act when he attains his age; and surely the Legislature never contemplated that the ratification should subsist to-day, and be annulled to-morrow: besides, the ratification should be done in a reasonable time, and not at such a distance of time as would divest the interest of the parties. It is a principle of law, that the act of an infant must be capable of delivery, and that he can only do a voidable act for his benefit; *Bing. Inf.* p. 6. This act will not operate for the benefit of the infant, for by it he deprives himself of a remedy against the land—he loses his power of distress, for the 5th section of the Act provides, that where the tenant sublets with consent of the landlord, such tenant's receipt for the rent to his sublessee, shall operate as an acquittal against the lessor and all deriving under him. Here is a positive injury to the infant, and, therefore, the act is void altogether.

Mr. Swan, in reply.—Although the acts of an infant are voidable by himself, yet they are valid as against all the world (b). This ratification is good until annulled, which must be done by the infant himself, and cannot be done by a third party. In *Zouch v. Parsons* it was held that any act, having even the semblance of benefit to an infant, was voidable, not void. Deeds, otherwise insufficient, have been held good as a covenant to stand seized, to avoid an injury to the party; *Doe dem. Milburn v. Salkeld* (c).

May 2.

BURTON, J., on this day delivered judgment.

After stating the facts of the case his Lordship said—The first question is, whether the deed of 1829 can operate so as to give a legal estate to the lessors of the plaintiff; that is, as a covenant to stand seized, and we are of opinion that it does so operate; we think that this deed passes the freehold estate in these lands, and for that reason this point must be ruled in favour of the lessors of the plaintiff. The next question is, whether the assignment is void, although the head landlord takes no part in the avoidance of it; and we are of opinion that it is void under the statute, unless the lessor, his heirs or assigns, confirm it. The next question is,

(a) Al. & Na. 326.

(b) Co. Lit. 173, a.

(c) Willes, 673.

whether there is a sufficient ratification under the provisions of the Subletting Act, to prevent the avoidance of the assignment; or whether, having been made by an infant, it amounts to a nullity. I apprehend it is perfectly clear, if the question arose where there was no such statute as the present in existence, and that this ratification had been made in the same manner as in the present instance, that this ratification would not be actually null and void, but only voidable, at the age of twenty-one years. It is a ratification under the hand of the heir, and with his signature to it; and the lease appears from its covenants and reservations, to be for the mutual advantage of both the lessor and lessee. I think, therefore, if there had been no such Act, the ratification would have been good. The question then arises, what is the effect of the statute? It is admitted that this ratification is good at common law; but it is said, in order to satisfy the statute, the ratification must be absolute. Now, the words of the statute do not import that necessity; nor do they exclude such provisional or conditional ratification: undoubtedly the statute might have provided that a ratification, otherwise than absolute, should be insufficient; but, although the statute might have done this, yet it has not done so. I do conceive that the Court, although it may construe ambiguous words, and give them effect on a consideration of the policy of the Act, yet it cannot introduce a provision of its own, on the suggestion that it is acting on the policy of the statute. But another consideration is, I think, decisive of the matter; the Act only extends to cases where the lease does not contain a clause in restraint of alienation; now, this is a lease containing a clause against alienation on certain terms; there is no foundation to say that in the case of a person who can make a lease containing a clause authorising alienation, he cannot execute a ratification of this kind. I think, also, it is too much to take it for granted, or to presume that the policy of the Act is of the nature contended for. We must, therefore, hold that the ratification is sufficient.

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PERRIN, J.

I concur in the judgment of the Court; but I wish to add—as it was strenuously contended that this assignment could not operate as a covenant to stand seized; or convey a legal estate, and that it was merely an equitable instrument—that I think the case of *Doe v. Salkeld*, cited by Mr. Swan, is exactly in point; and in *Sheppard's Touchstone*, 161, tit. *Covenant*, it is said, that a covenant doth sometimes make a transmutation of a property and possession of things, as in case of a covenant to stand seized of land to uses. There can be no doubt that this is a good covenant to stand seized, and conveyed the freehold to the lessors of the plaintiff.

Allow the cause with costs.

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Lessee of PATRICK M'AULEY, and several others,
 v.

CHARLES MÖLLOY, and others.

April 25, 27.

In an ejectment on the title, the demise in the declaration stated, that fifteen persons had jointly and severally demised &c., and at the trial it appeared, that the legal title to the premises in question was vested in one only of those persons. *Held* that this demise was bad, not being consistent with the title proved; and that the plaintiff should be non-suited.

EJECTMENT on the title.—This case was tried before Foster, B., at the last Spring Assizes of the county of Westmeath. The declaration contained three demises. The first demise (the only one on which any question arose) stated, that Patrick M'Auley and fourteen other persons named therein, on the 9th day of January 1841, *jointly* and *severally* demised the premises described in the declaration to the plaintiff, and concluded in the usual form.

It appeared in evidence, that at the time of the demise as laid in the ejectment, six of the lessors of the plaintiff were dead; that the legal estate was vested in one only of the remaining nine, and that he alone had title to the premises in question. Counsel for the defendants called upon the learned Judge to non-suit the plaintiff, upon the ground that there was a variance between the title stated in the declaration and the title proved, which his Lordship refused to do, but let the case go to the Jury upon the evidence generally, upon consent, reserving liberty to the defendants to apply to the Court above to set aside the verdict and have a non suit entered. The Jury found for the plaintiff.

A conditional order having been obtained to set this verdict aside, and have a non-suit entered.—

Mr. Plunkett, with whom was *Mr. Macdonagh*, now shewed cause.—

The question in this case is, whether the demise is sufficient to support the title that was proved at the trial. At the time the demise was laid in the ejectment, six of the lessors of the plaintiff were dead; it therefore could not be a joint demise, and we went to trial treating it as a several demise: the defendants not having called upon us to amend, we had the option of treating it as a several demise; and it having been shewn to be an impossible demise as to all, it remained a several demise as to those remaining. By the terms of the consent rule, the defendants are precluded from making the objection, for they thereby admit the power of the lessors of the plaintiff to make such demise as is stated in the declaration, *Doe dem. Poole v. Errington* (a); and this being merely a defective statement of title, not a statement of defective title, it is no ground of non-suit. *Doe dem. Parsons v. Heather* (b). This form has been fre-

(a) 3 Nev. & M. 652 note; S. C. 1 Ad. & E. 750.

(b) 8 M. & W. 158.

quently used without any objection being taken, and it would save the great inconvenience and expense attendant upon the old form of proceeding.

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Mr. *Smith*, Q. C., and Mr. *Battersby*, for two of the defendants, and Mr. *Berwick*, Q. C., and Mr. *Whiteside*, for Charles Molloy the other defendant.

If such pleading as this were allowed, it would have the effect of misleading the defendants, and would also be very inconvenient; for if the plaintiff may join fifteen persons in one demise, and is only bound to prove title in one of them, on the same principle he may join an unlimited number of persons, and the defendant will be compelled to meet the separate claim of each of those several plaintiffs; but independent of this argument *ab inconvenienti* this mode of pleading cannot be sustained on any legal principle, *Aslin v. Parkin* (a). In *Buller's N. P.* 107, it is stated, if there be several lessors, and you lay in the declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole; *Mantle v. Wollington* (b), *Treport's Case* (c), and from the case of *Doe dem. Poole v. Errington*, cited on the other side, it is clear from the argument in the note to that case, that this ejectment cannot be sustained. In *Doe dem. Blight v. Pett* (d), it was held that a joint demise could not be supported as the several demise of one or more of the lessors whose title was proved at the trial. The consent rule admits no title in the lessors of the plaintiff; that rule is established merely for the purpose of enabling the party to come before the Court on the merits, *Oates v. Brydon* (e), *Right dem. Lewis v. Beard* (f). The plaintiff must plead according to the legal effect and operation of the instrument on which he relies; and the legal estate having been shewn to be in one only of the lessors of the plaintiff, this demise can only operate as his demise, and the confirmation of the others, and as such is not sustainable; *Doe dem. Barney v. Adams* (g); *Adams Eject.* 210.

Mr. *Macdonagh* in reply.—The defendants having entered into the consent rule, the effect of it as an admission of the title proved by the party at the trial, and this must be considered as a joint demise by all, and the several demise of each of the lessors of the plaintiff. They are excluded from taking advantage of this by their conduct at the trial, for they there admitted they were tenants to one of the lessors of the plaintiff, and they cannot now after such admission call upon him to prove his title.

Cur. ad. vult.

BURTON, J., on this day delivered judgment of the Court.

April 27.

In this case certain objections had been taken at the trial before

(a) 2 Burr. 667.

(b) Cro. Jac. 166.

(c) 6 Co. 14. b.

(d) 11 Ad. & E. 853.

(e) 3 Burr. 1897.

(f) 13 East, 210.

(g) 2 Cr. & Jer. 232.

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Baron Foster, and the questions arising upon them have been argued very fully; but it becomes unnecessary to enter into an investigation of the merits of the separate objections taken by the several defendants; for the Court is of opinion there is one ground of objection upon which all the defendants have relied, and upon which they are entitled to have a nonsuit entered up. Although this particular objection can have no effect with respect to the trial of the merits between these several parties, yet, in the first place, if it be of such a description as we ought to take notice, and if it will entitle the defendants to have a nonsuit entered for them, we are bound to give our opinion upon this ground; and it is right for the sake of precedent, that we should take particular notice of it. We are of opinion that this objection is fatal, and that upon this ground, the defendants are entitled to have a nonsuit entered. The declaration states, "Whereas certain persons amounting to a considerable number, on the day stated in the demise *jointly* and *severally* demised the premises therein mentioned to the plaintiff;" upon the trial it turned out, not only that the entire number of persons had not demised, but that only one person was entitled to any interest in these premises. On the part of the defendants it is said, that this proof cannot sustain the demise in question; while on the other side it is contended, it is a joint and several demise, and that as such it lets in proof shewing the title to the whole in one of those persons. In considering this case it strikes us, that the latter mode of pleading is very irregular, and also that it is on principle indefensible, and such as the Court cannot sanction or adopt. It imports to be a joint title of several persons to the entire; the question then is, whether it authorises the proof of separate title in any of them to the whole of the lands? We think that such evidence is not allowable. This is not our construction. The demise in the declaration in ejectment, is for the purpose of shewing not only the title to be tried, but the true nature of that title, and the party cannot recover if the proof does not correspond with the title as stated in the demise. This is the defect of the demise in question, it does not exhibit the title which the party has proved; he has proved one title, and the demise which is intended to support that title sets out another. The case may be explained by considering what is the nature of a joint tenancy, and what of a several tenancy, and what is then the meaning of the words *jointly* and *severally*; if it had been stated that those persons jointly demised, that would not have been supported by shewing an absolute title in any one of them. The argument turned altogether upon the form of the demise being in these words, "Whereas the persons therein mentioned *jointly* and *severally* demised," and the answer to the objection is that these persons demised not only jointly but jointly and severally. Joint tenants hold *per my* and *per tout*; they each hold the entire as well as his own part, but each has a right to sever; in this sense they

hold jointly and severally the whole joint interest as conveyed; but if by one conveyance they jointly and severally convey, the question is, what is the meaning of these terms? It is this, that the joint estate of all, including the several estate of each, is conveyed, but it does not convey a separate title to the whole; that is, it does not mean that each conveyed the whole estate, for none of them had the whole. That is the effect and import of such a conveyance, and such a demise is affirmative of a joint estate in all. The plaintiff was, therefore, bound to prove a joint title to the whole in all the lessors, he could not prove a several title in any one of them; and for these reasons we are of opinion that the defendants are entitled to have a nonsuit entered.

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CRAMPTON, J.

I agree with the judgment which has been pronounced. In this case there was a reservation by the learned Judge who tried the case, that a nonsuit should be entered, in case the Court should be of opinion that the demise in the declaration was not sustained. We are called upon, therefore, to say whether he should have nonsuited the plaintiff. The objection is, that the demise is not sustained by the evidence. It is quite settled that the title must be proved as laid, and that the demise must be consistent with the proof. It is inconsistent in this case, and, therefore, a nonsuit must be entered. This is the proper remedy; it is not a case for an amendment as put by Counsel. We are called upon to say whether this demise is consistent with the title proved; it is a demise by fifteen persons, six of whom were proved to have been dead the day the demise was laid, and one only of those who survived had title; the demise amounts to this—that those persons jointly and severally demised, one title under one demise. We all understand the meaning of a joint demise; it is when joint tenants or parceners join in the conveyance of the whole estate; there may be something wrong in saying joint tenants severally conveyed: but if upon the trial of an ejectment in this form, only one of fifteen persons is proved to have title, that is a clear ground of nonsuit. In Mr. *Longfield's* book on *Ejectment*, p. 16, the principle is very clearly stated. It is said that the objection is cured by stating that the lessors of the plaintiff *jointly* and *severally* conveyed; but it is impossible the instrument can have this effect, unless in the case of joint tenants who convey both *per my* and *per tout*, if several they must be tenants in common; therefore, in either case, there is a variance. But, it was contended that this count should be taken as if fifteen persons severally demised; in the first place, that is not the view that has been taken by the pleader; he has stated it as one demise, conveying the term on a particular day. Are we, for novelty of this description, to supersede all precedent which had been so long introduced? It is of great importance that we should stand by precedent, *stare decisis*. But for what

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purpose should we depart from this principle; is it for the purpose of saving expense? On the contrary, great mischief would arise from it; here the lessors of the plaintiff are put together in one mass; it is left to the plaintiff to select one, two, or three, in whom to make title. This pleading may have the effect of misleading the Court and the defendant; for, if plaintiff may join fifteen persons, he may join five hundred, and take chance at the trial of proving title in some one of them, and the defendant must be prepared to meet the several title of each. I do not think there is any thing like authority for this; in assumpsit, certainly, there is a general count called the money count, that is, in general, considered as only one count, but there is no analogy between the two; and it was said he was a bold man who first introduced the money counts; but he was still a bolder man, who sought to introduce fifteen demises into one count. This pleading cannot be supported; it is bad both on principle and according to precedent, and, therefore, a nonsuit must be entered.

PERRIN, J.

I concur in the judgment of the Court. I think this novel and experimental mode of pleading calculated to confuse and perplex the defendant, therefore it ought not to be encouraged. At the utmost, it must be taken as a joint demise—either by joint tenants or tenants in common—neither has been proved; therefore, the plaintiff must be nonsuited.

Verdict set aside, and a nonsuit entered.

April 30.

Lessee WALKER and others, v. DWYER.

Where an Attorney enters an appearance and takes defence to an action brought against an infant, before a guardian had been appointed for such infant; the Court will hold him liable for the costs incurred by the opposite party in setting aside such defence.

MR. R. C. WALKER applied that the order made in this cause on the 31st of January be amended, by directing that the costs mentioned in said order may be paid by Michael Shortal, who took defence for the premises mentioned in the ejectment in this cause, as the guardian and next friend of the defendant.

It appeared that the defendant was a minor, and that defence had been taken to the ejectment in his name by his Attorney; that the plaintiff served a notice of motion dated 20th of January 1842, to set aside this

defence, and to mark judgment as if no defence had been taken; a conditional order, grounded on this notice, was obtained to set aside this defence on the 22nd of January; on the 28th of January 1842, defendant's Attorney entered a rule for liberty to take defence to the ejectment in the name of Michael Shortal, as next friend and guardian of the defendant, and served notice thereof upon plaintiff's Attorney. The conditional order to set aside the defence was made absolute on the 31st of January, omitting to direct by whom the costs of such order should be paid.

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Mr. Sausse, contra.—They have no right to charge the guardian with costs incurred before he had appeared; if there has been irregularity he should not be answerable for it, not being before the Court at the time; *Lessee Coane v. Coane (a)*. The Court will not attach a guardian for costs, and as he was not bound to give security for costs, there are no means to recover the costs incurred before he was present in Court; as to the practice, they should have called upon us to amend before they served this notice.

The Attorney was informed by the Officer that taking defence in the name of the guardian, would be sufficient cause in reply to the conditional order.

*Per Curiam.**

The costs of this order must be paid by the Attorney; he may recover them from the person who employed him. The order made on granting the application was, that the conditional order should be made absolute with costs; the plaintiffs now apply to have that order amended, by directing that the guardian should pay those costs; we are of opinion the Attorney should pay them, he being Attorney for the minor and guardian, and having appeared on the motion. We have full power to make this order, and the defendant cannot now be heard to say the costs should not be given; the Court, on full discussion, ordered that those costs should be paid, and defendant cannot now go behind that order; the plaintiff has gone to expense, he is entitled to be paid; this application being to amend the order granted, with payment of costs, which costs had been incurred by the irregularities of the Attorney, he must be made responsible for them.

(a) 2 Hud. & B. 356.

* Pennefather, C. J., *absente*.

E. T. 1842.
Queen's Bench.

PLUNKET, LEARY, and KEARNS

v.

PLUNKET.

May 9.

Where an affidavit upon which a *fiat* had been obtained for the arrest of a party under the 3 & 4 Vic. c. 105,* was filed without having a stamp upon it, no cause being pending in Court at the time between the parties.—The Court set aside the *fiat*, and ordered that the bail bond executed by the defendant and his sureties, should be delivered up to be cancelled upon his entering a common appearance.

Quære.—Must an action have been commenced before a *fiat* can be obtained?

In this case a conditional order had been obtained, that the *fiat* upon which the defendant had been arrested should be set aside, on the grounds stated in the affidavits; and on the further grounds of the said *fiat*, as well as one of the affidavits therein mentioned, being respectively entitled in the cause of *Patrick Plunket, Martin Leary, and M. Kearns, v. P. Plunket*, and the other affidavit being entitled, *Plunket and others v. Same*; no such cause as stated in the said affidavits or *fiat*, being then pending before the Court; and that the bail bond executed by the defendant and his sureties, be delivered up to be cancelled, upon defendant's entering a common appearance.

Mr. Plunket, with whom was *Mr. Hatchell*, Q. C., shewed cause.—The error in the title of the affidavit is mere informality, and will not vitiate it; *Clarke v. Cawthorne* (a); *Ferg. Prac.* 1173. The title to this affidavit may be treated as surplusage, no cause being pending at the time; *Schletter v. Cohen* (b): in that case, under the corresponding English Act, it was held the affidavit need not be entitled. There is no such rule in this Court as that adopted in England, requiring that affidavits made when there was no cause in Court, should not be entitled.

[BURTON, J.—There are many cases in which no rules are made in

(a) 7 T. R. 321.

(b) 7 M. & W. 389.

* When the 1 & 2 Vic. c. 118 (analogous with the 3 & 4 Vic. c. 105), first came into operation in England, it was the practice to require an affidavit of a writ of summons having been issued at the time the application was made for a Judge's *fiat*; *Turner v. Darnell*, 7 D. P. C. 348; but by the subsequent case of *Schletter v. Cohen*, cited in the argument of the above case of *Plunket v. Plunket*, that practice appears to have been altered, for Lord Abinger there says, "that there was some little doubt on the matter 'at first, because of the word 'plaintiff' in the statute; but the point came under the 'consideration of the Judges, and they came to the conclusion that it ought to have 'the same meaning as in the statute 12 G. 1, c. 29, where the same word is used to signify a party who intends to become plaintiff, and with that view makes an affidavit to 'hold to bail.'" In this Court, since the passing of the 3 & 4 Vic. c. 105, the most usual course has been to obtain the *fiat* prior to issuing the writ, and this appears to have been considered by the Officers of the Court the most correct mode of proceeding; but in some cases the writ has been issued first; in the Court of Exchequer the practice has been both ways indiscriminately. Previous to the passing of the late Act, the

Ireland, yet if the practice prevail in England, the Courts here have adopted it. I do not mean to say it is so in the present instance.]

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Mr. O'Hagan, contra.—An affidavit made to ground a *fiat* for the arrest of a party under this Act, must be entitled; for it is clear from the words of the 2nd section, that an action must have been commenced before a proceeding of this kind can be taken; for it uses the terms plaintiff and defendant, which can only be held to apply to parties to an action, and the affidavit is merely auxiliary to such action; *Stew. on Arrest*, 19; *Arch. Prac.* 485; if, therefore, it be necessary that it should be entitled, it should strictly follow the writ; *Fores v. Diemar* (a); *Doe dem. Spencer v. Want* (b); *Bullman v. Callow* (c); *Phelan v. Toole* (d). But, even admitting it is not necessary an action should have been commenced, yet, it has been decided that entitling an affidavit in a cause, no cause being in Court at the time, such title cannot be treated as surplusage, and the defendant will be discharged; *King v. Cole* (e); *Hollis v. Brandon* (f); *Green v. Redshaw* (g): these cases were decided before the

(a) 7 T. R. 661.

(b) 8 Taunt. 647.

(c) 1 Chit. R. 727.

(d) 2 F. & Sm. 30.

(e) 6 T. R. 640.

(f) 1 B. & P. 36.

(g) 1 B. & P. 227.

practice of the Courts in this country, with regard to affidavits to hold to bail under former Acts was not to entitle them (*Fer. Prac.* 1173; *Orr v. Devereux*, Batt. 163; *Yeo. & B. Prac.* 85; and in the Common Pleas there is an express rule upon the subject); these Acts were *in pari materid* with the 12 G. 1 c. 29, referred to by Lord Abinger, and the terms "plaintiff" and "defendant" used therein must have been considered to have had a similar meaning to that applied to those words in the 12 G. 1, in consequence of the practice having been adopted of not issuing a writ prior to filing the affidavit. There appears to be, therefore, no reason why a similar construction should not be put upon the same words in 3 & 4 Vic. c. 105, and there would be less difficulty in coming to such a conclusion upon this Act than upon the corresponding English Act, for by the latter it is expressly enacted that no personal action shall be commenced without a writ of summons, whereas in the Irish Act there is no enactment analogous thereto. Such would appear to have been the intention of the Legislature in adopting these words; for by the second section it is enacted, that upon obtaining the Judge's order it should be lawful to sue out one or more writs, &c., which clearly shews that it was never intended that a writ should have been previously issued. The only necessity for the issuing of a writ in the first instance would be for the purpose of giving the the Judge jurisdiction, as when once issued it could never be made further use of, and it would be absurd to suppose the Legislature intended that the Judge could not have jurisdiction to make an order under this Act, without the issuing of a writ, when under the former acts such order might be obtained by an affidavit made before an Officer of his Court, without any previous proceedings having been taken. See also the observations by Mr. Smythe in his introduction to his book *on Arrest*.

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rule was made in England. *Clarke v. Cawthorne* was decided in consequence of a practice having existed of entitling an affidavit in a cause, when there was no cause in Court; but the Court at the same time made a rule, that for the future such affidavits should not be entitled; the practice of this Court is not to entitle an affidavit to hold to bail. In either view of this case, therefore, the defendant is entitled to his discharge; if an action has been commenced, the affidavit is bad in not corresponding with the writ; if there be no cause in Court, the affidavit should not have been entitled, and the title cannot be treated as surplusage.

CRAMPTON, J.

The Officer informs me, that if there be no cause in Court, the affidavit requires a two-shilling stamp, but if a cause is pending, no stamp is necessary.

BURTON, J.

This last fact appears to make it imperative on the Court to disallow the cause shewn in this case, without the necessity of any rule of Court on the subject; the affidavit has no stamp, and we must, therefore, set aside the *fat*; but the objection for want of a stamp not appearing on the conditional order, we will give no costs.

ORDER:—Let the cause shewn against the conditional order be disallowed; let the same be made absolute without costs; let the *fat* be set aside, and the bail bond executed by the defendant; and his sureties upon his arrest in this case be delivered up to be cancelled, upon the defendant entering a common appearance, pursuant to the 3 & 4 Vic. c. 105.

1842.
Queen's Bench.

JOHN COLHOUN v. HENRY FOX.

Trinity Term.
May 24.

ASSUMPSIT for use and occupation.—The first count of the declaration stated, that the defendant was indebted to the plaintiff in the sum of £50 for the use and occupation of a certain dwelling-house and land, with the appurtenances, of the said plaintiff by the said defendant, and *at the request* and by the permission of said plaintiff, for a long term, then elapsed, had held, occupied, and enjoyed. To this count the defendant demurred specially, assigning for cause,—that the plaintiff had not alleged any request of or on the part of the defendant, to have, hold, occupy and enjoy the said dwelling-house and land in said count mentioned. Joinder in demurrer.

In a declaration for use and occupation, an averment that the defendant held and occupied at the request and by the permission of the plaintiff; *Held*, bad on special demurrer.

Mr. *C. Maturin*, with whom was Mr. *Sproule*, in support of the demurrer.

A request on the part of the defendant is a material averment in an action of this kind,—here there is no such averment; on the contrary, it is alleged that the request was on the part of the plaintiff; and, from all that appears on this declaration, the defendant may have been a mere care-taker. *Hayes v. Warren* (a); 1 *Saund.* 264, n. 1; *King v. Sears* (b). Parke, B., in giving judgment in that case says,—“A request would only be material “in case of an executed consideration. An averment of request is only “necessary in cases of executed consideration.” Here there is an executed consideration, and, therefore, a request should have been stated, and in all the precedents in the books on actions of this nature, a request is stated; 1 *Ch. Pl.* 374, 378; 2 *ibid* 40; *Hen. Forms* 36.

Mr. *Hunter*, and Mr. *John Brooke*, Q. C., *contra*.—The Court will intend there is a sufficient request on the part of the defendant: “by the defendant and at the request,” must be considered to mean at his request; a request on the part of the plaintiff would be inconsistent, and the Court will not support such a construction: *Spyer v. Thelwell* (c); *Derierner v. Fenna* (d). But on principle this demurrer cannot be supported; it cannot be maintained as a general proposition, that every executed consideration must be laid at request; if so, it would overrule two of the money counts. There are three classes of cases in which no request need be stated; first, in the case of a legal liability it is unnecessary,

(a) 2 Str. 932.

(b) 2 C. M. & R. 53.

(c) 2 C. M. & R. 692.

(d) 7 M. & W. 440.

T. T. 1842. *Church v. Church* (a); *Lee v. Muggeridge* (b); *Atkins v. Barnwell* (c);
Queen's Bench. 3 *Dyer*, 272, b. n.; these cases shew that where there is a moral obligation, it
COLHOUN is sufficient to support a promise; second, where there is a previous privity
v. with the defendant coupled with a probable advantage, this is exemplified
FOX. by the form of the count in an account stated, and in declarations for
contribution for party walls; thirdly, where there is necessarily an im-
mediate advantage to the defendant, it is not necessary to lay a request;
this is exemplified by the count for money had and received, also for
salvage; 2 *Chit. Pl.* 54; use and occupation belongs to the two latter
classes; the defendant held our land, and there was a previous consent,
which is the same as a request, and enjoyment is an immediate advantage;
Pillans v. Mierop (d), referring to the case cited in *Strange*, which is
there stated to be strange and absurd. There are precedents in the
English Pl. 15; *Pleader's Assist.* 5; in which a request is not averred:
and in the case of *Cotton v. O'Connor* (e) it was held that in an affidavit
to hold to bail for a sum due for the use and occupation of certain
premises, a request was unnecessary. On principle, this allegation is
wholly immaterial; it is what the defendant could not traverse, and
the plaintiff need not prove; except that it has been introduced into some
of the precedents, the Court should reject it altogether. The term
held shews a tenancy; occupying and holding at request of plaintiff, defend-
ant is bound to pay—the holding is a sufficient consideration for the
payment; *Exall v. Patridge* (f).

Mr. *Sproule*, in reply.—The statute gives an action where there is an
agreement, which must be alleged. This count is similar to that for
interest for money used and forborne; there is nothing in this case to
shew that it may not have been a mere gratuitous bailment. He cited
also 1 *Ch. Pl.* 343, 6th ed.; *Wennale v. Adney* (g); *Pl. Assist.* 5, 215, 268;
3 *Went. Pl.* 65, 276; *Lilly's Ent.* 35, 36.

BURTON, J., on this day delivered judgment.

May 27.

The learned Judge, having read the declaration, stated :—to this decla-
ration a special demurrer has been taken, on the ground that the pleader
not having alleged a request on the part of the defendant, but, on the
contrary, a request on the part of the plaintiff; that, therefore, the
declaration is bad. For the plaintiff it is argued, that there is sufficient
appearing on the face of this declaration to amount to a request on the
part of the defendant. I certainly have great objection to exert any

(a) Sir T. Ray. 260.

(c) 2 East, 505.

(e) 1 C. & Dix, 365.

(b) 5 Taunt. 36.

(d) 3 Burr. 1671.

(f) 8 Taunt. 308.

(g) 3 B. & P. 252, n.

astuteness in detecting inconsistencies, but here the language is perfectly plain, it is impossible to put the construction sought on the language. The next ground relied on is, that it is not essential to aver any request; with regard to this, it is only necessary to advert to the first case which has been cited, 1 *Wms. Saunders*, and the case in *C. M. & R.* 53.

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These cases establish the general principle, that when there is an executed consideration a request must be stated: to this rule there are some exceptions,—one, the case of *indebitatus assumpsit* for money had and received—and for this reason, that a duty arises by receipt of the money for another's use; another is in the case of an account stated, but in that case there is a mutual contract, therefore, no request is necessary; in this case it cannot be stated or alleged from the mere act of occupation, that any duty arises; it may be a gratuitous occupation, or at the instance of the plaintiff himself. The next thing to be done is, to look to the rules which are generally applicable to the case in question. *Laws on Pl.* 186, expressly states the rule applicable to this case, and in *Woodfall L. & T.* in the forms there set out, a request is averred. As to what is the acknowledged practice, in the 2 *Chit. Pl.*, 5th ed., which was before the passing of the New Rules, the forms all contain a request; and in the 6th edition of the same book, which was subsequent to those rules, the precedents in which are of particular value,—the object of them being to shorten the pleadings, and being established for the purpose of simplifying the subject matter,—it is remarkable these averments are expressly stated in pages 34 and 36. These are sufficient to establish what is the proper form, and that a request is not immaterial. In this case it may have been for the benefit of the plaintiff, or for the mutual benefit of both, which may not be a sufficient consideration for the promise, and it seems to me that such request should have been inserted, to shew that it was not a gratuitous occupation by the defendant. But, further, supposing no request necessary, yet it is quite clear if a request was laid, it should have been laid as the request of the defendant; but here a request has been laid on the part of the plaintiff, which is not sufficient consideration for the *assumpsit* of the defendant. The cause of demurrer which has been assigned is sufficient to let in this objection; therefore, on this ground alone it might be sufficient to give judgment for the demurrer. No doubt, it was plain this error should have been set right when it was noticed, and an amendment been made under the statute; this has not been done, therefore, we must allow the demurrer.

Allow the demurrer.

T. T. 1842.
Queen's Bench.

REGINA v. CARROLL.

May 24.

Practice in
Crown Cases.

MR. O'HAGAN moved that a prisoner brought up under a *habeas corpus* should be discharged from custody, or admitted to bail, upon the ground that there was no offence charged on the committal, and that nothing appeared on the information to charge the party with a felony or a misdemeanour.—[PERRIN, J. Has notice been given to the Attorney-General?—No, where the party relies on matters apparent on the face of the informations, notice to the Attorney-General is not necessary. In the note to *Res v. Stewart* (a) it is stated to be the practice, that if upon the return of the informations, the prisoner does not seek to rely upon any matters but those apparent on the face of them, there is no need of giving notice to the prosecutor or the Attorney-General.

BURTON, J.

The Court will not make an order in a case of this nature, except where the Crown has an opportunity of judging whether it is a fit case, notice therefore, must be given to the Attorney-General.

No Rule.

(a) Batt. 139.

T. T. 1842.
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REGINA v. HANS STEWART HAWTHORNE, JOHN
 HAWTHORNE, and ALEXANDER LITTLE.

May 24.
 June 3.

THIS was a writ of error returnable in this Court from a judgment pronounced against the prisoners, who had been tried at the Quarter Sessions of the county of Fermanagh, on an indictment under the 9th G. 4, c. 56, s. 24. The indictment stated that Hans Stewart Hawthorne, John Hawthorne, and Alexander Little (the said Hans Stewart Hawthorne being possessed under a lease for a life still subsisting, as tenant of a certain dwelling-house and lands in the county of Fermanagh), on the 7th day of October in the fifth year of the reign of Queen Victoria, at Fairwood in said county, did then and there unlawfully, fraudulently and maliciously, and not for the purpose of any intended improvement or beneficial alteration therein, pull down and demolish part of said dwelling-house, then and there situated, to wit, the roof thereof, and did then unlawfully, wilfully, fraudulently and maliciously, take and carry away from the roof of said dwelling-house a large quantity of lead, to wit, &c., against the peace, &c. To this indictment, and the judgment thereon, the following errors had been assigned: first, that the statute of 9 G. 4, c. 56, s. 24, did not extend to the lessee under a freehold lease; secondly, that the charge was not alleged in the words of the statute, nor was it brought by averments within any part of the section; thirdly, that the

An indictment under the 9 G. 4, c. 56, s. 24,* charging three persons with pulling down and demolishing part of a dwelling-house; *Held*, bad as against two of those persons, it not having stated they they were in possession of the premises; *Held*, secondly, that it was bad against all, it not having charged them with demolishing the whole house, or with beginning to demolish the whole, or with demolishing part with intent to demolish the whole.

* G. 4, c. 56, s. 24, enacts,—“That every person who, being possessed in any manner or right whatever, of any dwelling-house, or other building, held under or by virtue of any lease or agreement, or for any term of years, or other less term, certain or at will (whether the possession of such dwelling-house, or other building, or part of such dwelling-house or other building, shall have been obtained for the fraudulent and malicious purpose of pulling down or demolishing the same, or for any other purpose whatever), shall wilfully, fraudulently, or maliciously, and not for the purpose of any intended improvement, or beneficial alteration therein, pull down or demolish, or begin to pull down or demolish the same, or commit any other unlawful waste or destruction thereof or thereto, or shall pull down or sever from the freehold any fixture or utensil, being within or appurtenant to such dwelling-house, or other building, or used or occupied therewith, or which in a due course of occupancy ought not to be so pulled down or severed from the freehold, or who shall wilfully and knowingly aid, abet, or assist in the same; or who shall wilfully and knowingly purchase, or contract to purchase, the materials, or any part of the materials of which such dwelling-house, or other building, was constructed, or any fixture or utensil, being within or appurtenant to any such dwelling-house, or other building, or part of such dwelling-house, or other building, or used and occupied therewith, and which, in due course of occupancy, ought not to be pulled down and severed from the freehold, shall be deemed, and is hereby declared to be guilty of a misdemeanor, and shall be subject and liable, on conviction thereof, to the like pains and penalties as in cases of misdemeanor.”

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plaintiffs in error were all charged as principals, and yet it was not alleged that John Hawthorne and Alexander Little had any interest in the house in question; fourthly, that the charge, as laid in the indictment, did not constitute an offence for which the plaintiffs in error could be convicted either as principals or accessories; fifthly, that no criminal offence was stated upon the record, upon which the conviction could be sustained against the plaintiffs in error.

Mr. *Napier*, Q. C., with whom was Mr. *Sproule*, in support of the writ of error.

In this argument it will be necessary to consider separately the case of Hans Stewart Hawthorne from the other two, he being charged as tenant to the house, and the other two not being charged as having any interest therein. The first question is, as to the class of persons committing the offence, what relation they should stand in with regard to the property? They must be persons only entitled to a chattel interest, for the statute speaks only of persons possessed; but the indictment states that Hans Stewart Hawthorne was possessed of a freehold interest; in the construction of the statute for forcible entry, "seized" has been held to apply solely to a freehold interest; therefore, in analogy with that statute, "possessed" should be construed as applying solely to a chattel interest. The next question is, as to what constitutes the offence? The clause of the Act applies to the case of a total destruction, it does not apply to a case of a partial demolition; there is no averment in this indictment that there was an actual destruction of the house, and the next section of the Act proves the necessity of such an averment, for it provides for the case of partial destruction. This statute distinguishes between total destruction and partial injury, which is plain from the terms of the 25th section. In a case where words of this kind, "demolish or pull down" are used, the parties must be charged with having pulled down the whole; or, if only part, with the intention of pulling down the whole; *Ashton's case* (a); *Rex v. Thomas* (b); that case is exactly similar to what appears upon the present indictment, the identical words are used in both Acts. The words in the section "commit any unlawful injury," must be *ejusdem generis* with the foregoing and subsequent.

As to the two other traversers, they stand upon different grounds; they should have been brought within that part of the section which states—"if any person shall wilfully and knowingly aid, abet, or assist," it is not stated they wilfully and knowingly aided and abetted; they are not charged as principals, not having an interest in the property, nor are they charged as aiders and abettors, it not having been stated that they

(a) 1 Lew. C. C. 296.

(b) 4 C. & P. 237.

"wilfully and knowingly, &c.," as used by the statute; *Rex v. Ryan* (a); *T. T. 1842. Rex v. Ryan and Connor* (b). The indictment may be good as against the principal, but bad against the accessories; *Regina v. Green and others* (c); *Rex v. Nicholas and others* (d). *Queen's Bench.*
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Mr. M'Causland, and *Mr. J. Brooke*, Q. C., *contra*.—The 24th section of the Act states—"Whether the possession of such dwelling-house, or part of such dwelling-house, have been obtained," &c.; the Legislature would not have made use of these words if the Act was to be applied to a total demolition of the house. It is not necessary that an intent to demolish the entire should be stated, if the offence, as laid in the words of the statute, be sufficient. As to the question with regard to the other two parties, although there is some weight in the objection for the omission of the word "wilful," yet under the 33rd section of the statute they may be indicted as principals; as to Hans Hawthorne, he is properly indicted, for he is stated to have an interest in the house.

Mr. Sproule, in reply.—The demolition must mean a total demolition. As to the other two parties, they are not charged either as principals or accessories; for the first part of the section, down to the words "aid and abet," refers only to the persons possessed of the house, and they are not stated to be in possession; and the 33rd section will not aid this indictment, for they are not charged as principals, it not having been stated they were in possession; and that section applies to parties who could not be principals within the meaning of the Act.

BURTON, J., on this day delivered judgment.

After stating the pleadings, he went on to say, that errors had been assigned to the indictment; first, that the indictment did not shew that John Hawthorne and Alexander Little were in possession of the dwelling-house; and, secondly, that judgment was given for the Queen, and not for the prisoners. As to the first objection, it appears decisive, so far as the indictment charges John Hawthorne and Alexander Little; because they are clearly not brought under the provisions of the statute, the 24th section of which specifies the offence thereby made the subject of that provision, as being committed by the person having possession or right to the dwelling-house, whereas these two persons are not shewn by the indictment to have any possession or right; nor does the 33rd section cure this defect. Further, the indictment is bad on this section as to all, because it only charges a demolition of part of the house,—it does not charge them with demolishing the whole, or a beginning to demolish the

June 3.

(a) 7 C. & P. 854.

(b) 2 Moo. C. C. 15.

(c) 1 Cr. & Dix, C. C. 77.

(d) 7 C. & P. 538.

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whole, or demolishing part with intent to demolish the whole; nor does it charge them with committing unlawful waste, or pulling down the fixtures, which must be done. With respect to the charge of taking away the lead, that could not be sustained under the terms of the statute; and, indeed, it was admitted on all hands, that part of the indictment could not be supported, and at the trial was rejected as surplusage. Upon these grounds, we are of opinion, the indictment does not bring the case within any of the terms of the statute, and, therefore, the judgment must be reversed.

Judgment reversed.

MABEL TUCKER v. THOMAS KIRWAN.

May 25.

In an action of *tres. qua. clau. fre.* defendant pleaded first, general issue; second, as to ejecting, expelling, &c., *actio non*, because he was lawfully possessed of the said premises; and the plaintiff having entered thereon and unlawfully taken possession of the said premises, and without the license of the defendant, he the defendant expelled and removed her therefrom.

Held, that this plea was bad on demurrer, because it did not shew a better title than plaintiff had; and because it purported to be a justification, yet did not shew title to warrant a justification.

TRESPASS for breaking the plaintiff's close; the declaration contained three counts. The first count was for breaking and entering the dwelling-house of the plaintiff, and breaking open doors and seizing goods therein. The second count stated that the defendant, on the day and year, &c., with force, &c., broke and entered certain other premises of the said plaintiff, at, &c., and then and there ejected, expelled, put out and amoved the said plaintiff and her family from the possession, use, occupation and enjoyment of the said premises, and kept and continued them so ejected, expelled, put out and amoved for a long space of time, to wit, from thence hitherto, whereby the said plaintiff for and during all that time, lost and was deprived of the use and benefit of her said premises, to wit, at, &c. The third count was the common *asportavit* count. To this declaration the defendant pleaded—first, the general issue; second, a special plea to the first count, on which two pleas issue had been joined; third plea, as to the ejecting, expelling, putting out and amoving the said plaintiff and her family, in the said second count mentioned, from the possession, use, occupation and enjoyment of the said premises for the time, &c., the said defendant says *actio non*; because he saith, that before and at the time when and soforth, he the said defendant was lawfully possessed of the said house and premises, in the said second count mentioned, situated, &c., and the said defendant being thereof so possessed, the said plaintiff, a little before the said time, when and soforth, to wit, on, &c., at, &c., wrongfully, unlawfully, and without the consent, and against the will of the said defendant, intruded herself and entered into the said dwelling-house and premises in which, &c., and unlawfully took possession thereof, and wrongfully and injuriously, and without the license and against the consent of the said defendant, attempted to keep possession thereof; for

which reason he the said defendant ejected, expelled, put out and amoved the said plaintiff and her family from the possession, use and enjoyment of the said dwelling-house, in which, &c., and kept and continued the said plaintiff, with her family, so ejected, expelled, put out and amoved from the possession, occupation, use and enjoyment thereof, for the time, &c., and as he lawfully might for the causes aforesaid, which are the supposed trespasses, &c.; concludes with a verification. To the third plea plaintiff demurred specially, assigning as cause—first, that defendant did not confess, or avoid, or traverse, or deny the breaking and entering, or the causes of action in said count; secondly, that matters of aggravation, not the gist of the action were pleaded to and attempted to be put in issue, and the defendant attempted to justify the consequence of his acts, not the acts themselves, whilst the cause of action was left unanswered; thirdly, the breaking and entering had not been pleaded to; fourthly, no issue upon a matter decisive of the merits, or going to the cause of action, was tendered; fifthly, no request by the defendant for the plaintiff to depart prior to the expulsion; sixthly, that the manner of denying plaintiff's possession was indirect and argumentative; seventhly, that it did not give colour or apparent cause of action; eighthly, that it amounted to the general issue; ninthly, that the defendant did not shew title to the fee in any person under whom he became possessed of the said house, or any grant or conveyance, or by what means he became so possessed; tenthly, also, that the defendant, whose alleged interest was a particular estate, had not deduced title from the fee.

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Mr. Macdonagh and Mr. Smith, Q. C., in support of the demurrer,—It is settled that in justifying a trespass to land, in professing to answer a local action, the defendant cannot rely upon an allegation of mere possession, but must set forth some special title, or superior right in himself; he cannot rely upon his alleged possession, as against the plaintiff, who states the close to be her own. The distinction between declarations and pleas is well established; in a declaration a general allegation of title is sufficient, in a plea justifying by virtue of a right, the title to the right must be set out formally; *Grimstead v. Marlowe* (a); *Attorney-General v. Gauntlett* (b). In an action of trespass *quare clausum fregit*, the defendant is *primâ facie* a wrong doer; that is, until he pleads title, the effect is the same as if he had none; this is different from the case of an assault upon the plaintiff, where the defendant is at liberty to rely on a defence of possession of his close, for then the plaintiff had set up no title at all; *Step. Pl.* 195; in that case the title or interest does not come in question, but the possession is stated as inducement to the justification;

(a) 4 T. R. 718.

(b) 3 Y. & Jer. 93.

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Skavill v. Avery (a); *Pearle v. Bridges* (b), 6 *Com. Dig.* tit. *Pleader*, 66, 121. The defendant has confessed that he ejected and expelled the plaintiff from her house, and shews no justification, but an allegation that at the said time when, &c., the defendant was in possession of the same premises, which on the principle of confession and avoidance, he must be taken to admit the plaintiff had possession of; but it goes farther, and actually states that the plaintiff had taken possession of the premises, and that he re-took the the possession. This plea amounts to the general issue; 1 *Chit. Pl.* 542. If this plea be considered as a plea in confession and avoidance, it is bad for not giving colour; if it be considered as a traverse, it is an argumentative denial, and in either view departs from the prescribed form of pleading; *Taylor v. Cole* (c). The expulsion is matter of aggravation, and matter of aggravation cannot be pleaded; 1 *Chit. Pl.* 645.

Mr. Coleman *M. O'Loughlin*, with whom was Mr. Pigot, Q. C., in support of the plea.

As to the first objection, that the breaking and entering has not been answered, the general issue covers that; the plea only professes to be pleaded to the ejection; if a plea begin with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is bad; but if a plea begin only as answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, for the whole action is thereby discontinued: he should take judgment by *nil dicit*; 1 *Saund.* 28, n. 3; 6 *Com. Dig. Pl. E.* 1. If two independent acts are complained of in an action of trespass, the defendant may justify as to one, and plead not guilty as to the other; 7 *Bac. Ab. Trespass*, 716. As to the second objection, that we have pleaded to matter of aggravation:—a count in trespass is divisible; *Ham. N. P.* 81; when in the same count a plaintiff complains of two acts, each of which are, by themselves, distinct injuries, for which trespass would lie, the defendant may either treat the latter of these injuries as laid in aggravation of the first, or as a distinct injury for which the plaintiff seeks redress; *Ham. N. P.* 96; expulsion is a trespass in itself, and might be alone the subject of an action of trespass, it is in its nature a distinct act from the entry; *Taylor v. Cole* (d). Trespass lies for an expulsion, although the original entry may be lawful; *Etherton v. Popplewell* (e); *Larkin v. Porter* (f); *Johnson v. Allen* (g); *Goodtitle v. Tombs* (h): one tenant in common cannot maintain *tres. qua. clau.*

(a) Cro. Car. 138.

(c) 3 T. R. 292.

(e) 1 East, 139.

(g) 12 Mod. 658.

(b) 2 San. 40, a.

(d) 1 H. Blac. 561; S. C. 3 T. R. 292.

(f) 1 H. & Br. 529.

(h) 3 Wil. 119.

fre. against his co-tenant, but he may maintain an ejectment for an actual ouster, which is trespass in its nature. As to the third objection, that there is no allegation of request:—such an allegation would be superfluous, it is only necessary in justifying for assault; 9 *Went.* 103, 118; *Collier v. Hicks* (a); *Tullay v. Reed* (b); *Vin. Ab. Tresp. G. 2.* As to the fourth objection, that the plea denied possession, and has not deduced title, the use of pleading is to bring such material facts on the record, as may plainly bring the merits of the case into question; *Taylor v. Eastwood* (c); here the possession was but inducement to the justification and not the substance thereof, and need not be stated with certainty; possession is sufficient to maintain a count for expulsion; *Serle v. Bunnion* (d); *Hoyte v. Hogan* (e); *Harrington v. Bushe* (f). As to the fifth objection, that it amounts to the general issue and does not give colour:—a justification cannot be given in evidence under the general issue. If any circumstance make an act, which is in general a trespass, lawful and excusable, this may be pleaded specially in an action of trespass; 7 *Bac. Ab. tit. Tres. I.*; 6 *Com. Dig. Pleader. G. 14*; if it does amount to the general issue, plaintiff should have entered a *nil dicit* (g). Any plea may be pleaded if colour is given; a party may plead that specially which he might give in evidence under the general issue; *Hartford v. Jones* (h); *Argent v. Durrent* (i); *Layfield case* (k); *Hallit v. Birch* (l).

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BURTON, J.

The Court is of opinion that the demurrer to the plea in this case, which has been admitted to be a singular one, should be allowed. There is no precedent to be found, and certainly in the course of my experience I know no instance of it. It strikes me that it is not only without precedent, but not sustained, upon acknowledged and admitted principles. It has been argued with great ingenuity, and all the cases have been cited that could be found to sustain the plea; but the principles upon which it is suggested this plea might have been sustained, cannot be extracted from the cases cited. The declaration states that the defendant entered upon certain premises, the property of the plaintiff; that is what is complained of; and, in addition thereto, that he ejected, expelled, and removed the plaintiff. To this declaration the defendant has pleaded—first, the general issue “not guilty;” what is the effect of that plea? The import of that plea is, I did not commit what has been complained of; that is, I

(a) 2 B. & Ad. 666.

(b) 1 C. & P. 6.

(c) 1 East, 217.

(d) *Frem.* 205; S. C. 2 Mod. 70.

(e) 2 J. & Sy. 226.

(f) 11 Mod. 220.

(g) *Hob.* 127; 2 *Roll.* 140; 1 *Leon* 178; 3 *T. R.* 725.

(h) 1 *L. Ray.* 393.

(i) 8 *T. R.* 403.

(k) 10 *Coke*, 405.

(l) 3 *Salk.* 272.

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did not enter the premises which you stated to be your property. It would be a mistake to say that such a plea would enable the defendant to shew title adverse to the plaintiff, as that would be matter for a plea of justification, the plea of not guilty being *prima facie* an avowal of title in the plaintiff: it may be a denial of the plaintiff being in possession, but does not assert a superior title, which should have been done by a special justification. The second plea avoids saying any thing about the entering; but says I expelled you from these premises; and it is alleged that the defendant has a right to say, I did expel you, because I had a better title than you had to these premises; true, he may say this; but if he does so he must shew that better right on his plea; that is the fallacy here, the plea purports to be a justification, and yet it does not shew a title warranting a justification of that description. It is a novelty in pleading, and however artfully it may have been composed, the Court cannot sanction it; and, therefore, the demurrer must be allowed.

CRAMPTON, J., and PERRIN, J., concurred.

Demurrer allowed.



Lessee O'BRIEN *v.* DWYER.

June 2.

In ejectment on the title a defendant will not be compelled to give security for costs, unless fraud or collusion is clearly shewn.

MR. SCULLY shewed cause against a conditional order, calling on the defendant in this cause to give security for costs. This was an ejectment on the title. The affidavit of the defendant stated, that he had come into possession of the premises by virtue of an assignment, which he had obtained from the previous occupier, for good and valuable consideration; that this assignment had been executed and registered previous to the service of the ejectment. A person will not be compelled to give security for costs in defence of his own possession. There is no case in which it can be shewn that on ejectment on the title, the defendant was compelled to give such security; all the cases in which such an order has been made, are cases for non-payment of rent.

Mr. Benjamin Stephens, contra.—This ejectment is brought against an overholding tenant, on a notice to quit, and the assignment under which the defendant claims was made to him solely for the purpose of enabling the tenant to avoid giving security for costs; the defendant was merely the caretaker of the original tenant. The tenant could have no interest

in the premises at the time of the assignment, it having been made subsequent to the service of the notice to quit, and a very short time previous to the service of the ejectment. In *Longfield on Eject.* 75, it is stated, if defence be taken collusively in the name of a person served, for the purpose of embarrassing the plaintiff, the plaintiff may obtain security for costs.

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I do not think it is in our power to accede to this motion; we are not at liberty to call upon a person to give security for costs in defence of his own possession. It is certainly a very suspicious case, and we shall not, therefore, give the costs of the motion.

Motion refused without costs.

Lessee SYMES v. EJECTOR.

June 4.

MR. COATES applied that the commission of Robert Bates, who had been appointed an Officer of this Court for taking affidavits, should be enrolled *nunc pro tunc*, in order to enable the plaintiff to proceed with his ejectment in this cause, so as to have a trial at the ensuing Assizes.

Where a Commissioner for taking affidavits neglected to enrol his commission upon his appointment, the Court allowed it to be enrolled *nunc pro tunc*, in order that the suitor should not be prejudiced by such neglect.

The affidavit of the Attorney for the lessor of the plaintiff, upon which the application was grounded, states, that this was an ejectment for non-payment of rent, brought for lands in the county of Wicklow, and that copies of the ejectment have been served on the several parties interested in the premises, and affidavits of the service thereof had been sworn before Robert Bates, a Commissioner of this Court for taking affidavits; that deponent had moved on said ejectment on the 30th of May last, but was informed by the Officer that the name of Bates, the Commissioner who had subscribed the affidavit, not having been enrolled, he could not proceed on the ejectment. He further states that there would not be sufficient time to have the affidavit re-sworn, so as to enable the plaintiff to move on the ejectment and to have a trial at the ensuing Assizes, in case defence should be taken; and that there is a large arrear of rent due to the lessor of the plaintiff, who would suffer considerable loss if the cause was not tried at the ensuing Assizes.

The plaintiff should not be prejudiced by the neglect of the Officer, and if this application be not allowed, plaintiff cannot have a trial at the ensuing Assizes (a).

(a) Sm. & B. 476, note.

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Per Curiam.

Let the commission be entered *nunc pro tunc*, the plaintiff undertaking not to proceed to judgment before a fortnight, and to serve this order.

Motion granted.

THE QUEEN, at the relation of MARTIN HONAN,

v.

The HONORABLE CHARLES SMYTH VEREKER.

May 31.
June 13.

Rating under the Act for the relief of the poor in Ireland, must have been in existence for twelve months prior to the 31st of August in the year in which the Municipal Corporation Act (3 & 4 Vic. c. 108) comes in operation in any borough in Ireland.

Therefore, as the poor rate was first struck in Limerick in September 1840; *Held*, that that statute could not come into operation in that borough until the year 1842; as a twelve months' rating to the poor prior to the 31st of August, would not be completed until August in that year.

The matters required to be done by the 38th section of that statute are essential, and the Act is in regard to them imperative, and not merely directory.—Perrin, J., *dissentiente*.

INFORMATION in the nature of a *quo warranto*, for usurping the office of Mayor of the city of Limerick.—The information in this case stated, that the office of Mayor of the city of Limerick was an ancient office, and that at the time of, and for a long time previous to, the passing of the 3 & 4 Vic. c. 108 (the Municipal Corporation Act), the Mayor, Sheriffs, and Citizens of said city, had been one body, politic and corporate, in deed, fact and name, by the name of "The Mayor, Sheriffs, and Citizens of said city:" that on the 5th of September 1840, a rate for the relief of the destitute poor was made in said city, and that in pursuance of said Act, the Poor Law Commissioner certified to the Lord Lieutenant, that such rate had been made, and that thereupon the Lords Justices, on the 30th of October 1840, published said certificate in the Gazette, with a declaration, that on the day happening next after the expiration of twelve calendar months from the day stated in said certificate, as the day on which said rate had been made, to wit, on the 6th day of September 1841, the said Act should come into operation, commence and be in force in the said city of Limerick. The information then stated that afterwards, to wit, on the 10th day of August 1841, Earl Fortescue, being the Lord Lieutenant of Ireland, by and with the advice of her Majesty's Privy Council, made and published an order contained in a proclamation, bearing date the day and year last aforesaid; whereby, after reciting that the said rate for the poor had been made, and the declaration by the Lords Justices that the Municipal Act should come into force in Limerick on the 6th of September 1841, and the provisions of the statute in that behalf, and reciting by the said Act that it was also enacted, that certain matters should happen or be done on or before the 5th of September in the year in which the Act should come into operation, and that certain other matters should happen or be done on or before certain

days, and within certain periods therein specified; and reciting, that it was also enacted that it should be lawful for the Lord Lieutenant, if he should think fit, by the advice of her Majesty's Privy Council, to order any convenient day after the said Act should come into operation in any borough, for doing the several matters required or authorised by said Act, to happen or be done on the 5th of September in the first year in which the said Act should come into operation in that borough, instead of such 5th day of September; and that in such case all matters mentioned in such order should be done in said year on such day as should be mentioned in that behalf in such order, as if the day mentioned in such order had in every instance been mentioned in the said Act instead of the said 5th day of September, and not otherwise; and that all things required or authorised by the said Act to happen or be done on any other day, or within any time, from or before or after the day named in such Act, should be done or happen in the said first year on such other days and within such other times as should have, in point of time, whether prior or subsequent, the same relation to the day so ordered by the Lord Lieutenant, instead of the 5th day of September, as the day and time mentioned in the said Act had to the said 5th day of September: and further reciting, that by reason of the said Act coming into operation on the 6th of September, as aforesaid, the several provisions of the said Act could not be carried into effect within the several periods in the said Act specified and limited in that behalf; the said Lord Lieutenant, by and with the advice of her Majesty's Privy Council in Ireland, did thereby order and direct, that the day for doing the several matters required and authorised by the said Act to be done on the 5th day of September, in the first year in which the said Act should come into operation, should be the 20th day of September then next ensuing, instead of such 5th day of September; and that all things required or authorised by the said Act to happen or be done on any other day, or within any time, from or before or after any day named in the said therein mentioned Act, should be done in the said first year in the said borough of Limerick, on such other days, and within such other times, as should have in point of time, whether prior or subsequent, the same relation to the said 20th day of September as the days and times mentioned in the said Act had to such 5th day of September. The information further stated that the different proceedings required by the Act, viz., the revision of the lists by Barristers, the election of Town Councillors, and the election by them of the relator Martin Honan, as Mayor, did accordingly take place; and that the said Martin Honan had since resided, and still did reside, in the borough of Limerick, and had not resigned the office of Mayor, being an office of great power and preeminence touching the rule and government of said borough, and the administration of public justice within the said borough; that the said Charles S. Vereker,

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upon the 17th day of November 1841, and from thence hitherto, hath used and exercised, and still did use and exercise without any lawful warrant, royal grant, or right whatsoever, the office of Mayor of the city of Limerick, &c., and prayed process, &c. To this information the defendant pleaded the following plea, stating the charter of incorporation of King *James the First*: that his said Majesty thereby granted to the citizens of Limerick, that they should be a body politic, corporate in deed, fact, and name, and by the name of the Mayor, Sheriffs, and Citizens, and that by the said name they should have perpetual succession, and that from thence hitherto, accordingly, the said citizens had been a body politic and corporate, in deed, fact, and name; and that by certain rules made and established in the 25th year of the reign of King *Charles the Second*, the corporation were directed to proceed annually to the election of a Mayor, on the first Monday after the Feast of St. John the Baptist, and to return the name of such Mayor to the Lord Lieutenant for his approval; and that the person so elected and approved of, should be Mayor for one year next ensuing the first Monday after the Feast of St. Michael the Archangel, each year; and that according to such rules, and the usage of the corporation, the said C. S. Vereker had been elected, and by a certificate under the hand and seal of the Lord Lieutenant and Privy Council, dated 24th July 1841, approved of to be Mayor of Limerick for one year, to commence the first Monday after the Feast of St. Michael the Archangel, then next ensuing; and that accordingly the said C. S. Vereker did on the 4th October 1841, enter on his office. The plea then stated that, to the proclamation of the 10th of August 1841, in the information mentioned, thereto was attached a schedule which had been omitted in the information, and then proceeded to set out the schedule in its exact words and figures. (The first provision of the schedule was, that on or before the 16th of August 1841, offices should be opened for the receipt of taxes, cesses, and rates, and it then proceeded to name the days for every other proceeding required by the statute). The plea then alleged, that thereby and by reason of the premises, the said Martin Honan was not elected Mayor of the said borough, according to the form of the statute in that case provided, but he, the said C. S. Vereker, was so duly elected and admitted to the office of Mayor of the said city, and still continued to be and was the lawful Mayor, and had claimed and exercised, and still claimed to exercise the said office, and to have, use, and enjoy all the liberties, privileges, and franchises thereunto belonging: and thus the said C. S. Vereker is ready to verify, without this, &c.

To this plea there was a demurrer on the part of the relator; and the following causes of demurrer were assigned: for that according to the statement of the said information, admitted by the said plea, an election of a Town Council and of a Mayor of the borough, took place at the time in the said information, in conformity with the said Municipal Act,

in the said information mentioned, and therefore the said C. S. Vereker did not since such election of such Town Council and Mayor, lawfully fill the office of Mayor; and also, for that the order of the Lord Lieutenant, bearing date the 10th of August 1841, in the said information mentioned and set forth, was a valid order under the 212th section of the said Municipal Act, and that the said election of Council and Mayor displaced any title of the said C. S. Vereker, to the office of Mayor, which he might have had previous to such election.

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Mr. *O'Hagan*, with whom was Mr. *Pigot*, Q. C., in support of the demurrer.

The entire of the facts in this case are stated on the face of either the information or the plea. They are admitted on both sides. We do not deny Mr. Vereker's title prior to the 17th November 1841. He does not controvert the facts stated by us as to our proceedings in Limerick. There is a distinction between this case and any that has happened heretofore; we claim not as holding an ancient office, but an office which had been abolished by the Act of Parliament. He alleges, and we admit, that the validity of those proceedings, and their operation to displace him, depends on the legality of the proclamation of the 10th of August 1841. This proclamation he impeaches, as not in conformity with the provisions of the Municipal Act. We maintain its legality and perfect uniformity with the statute. By the 212th section of that Act, the Lord Lieutenant is empowered to substitute for the 5th of September, in the first year in which the Act comes into operation, any other convenient day, and then the Act by necessary consequence shifts every other day prescribed in it for any municipal proceeding, so that they shall bear the same relative proportion to the substituted day, as those named in the Act did to the 5th of September in the first year. There is indeed a provision as to the proclamation, viz., that the substituted day must be in the first year. Now here this condition is complied with, since whatever meaning be given the word year, the 20th of September, the day substituted by the proclamation for the 5th of September in the first year, is itself in the first year. This is evident on considering that the words "first year," can only have either of two meanings, viz., the calendar year in which the Act happened in any particular borough to come into operation,—i. e. in Limerick, the year 1841, or the municipal year, viz., the year beginning on the day on which the Act comes into operation in any particular borough—i. e. in Limerick, the year beginning the 6th of September 1841, and ending the 6th of September 1842. It may be contended that the preamble to the 212th section limits the enacting part, and that we are not entitled to go beyond the meaning of the preamble; where the words are large, comprehensive, positive and expressive, the Court will not limit them in doubtful cases; *Dwar. on Stat.* 655. *Pallison v.*

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Banks(a); *Colehan v. Cooke(b)*. Here the words of the enacting clause are general and express; but even if the preamble was limited, the Court will not, for that reason, limit the enacting part under these authorities. This Act is analogous with the 5 & 6 W. 4, c. 76, *Eng.*, and should receive a similar construction; the object of the Legislature was to have the Act come into operation at the earliest possible period; *Cooper's Municipal Act*. These Acts are *in pari materia*; you will, therefore, presume the intention of the Legislature to be the same; *Dwar. on Stat.* 699. As to the policy of the Act; where an Act has a remedial policy, the Court will go far to construe it according to that policy. 1 *Step. Mun. Cor.* 67; *Dwar.* 718.

Mr. T. B. C. Smith, Q. C., with whom was Mr. Napier and Mr. John T. Ball, in support of the plea.

The simple question is the validity of the proclamation, and that depends on the construction given to the 212th section; this section empowers the Lord Lieutenant to issue a proclamation when the Act cannot come itself into force, but it attaches two conditions to the exercise of that power, and not, as Counsel for the relator would argue, but one; viz., first, that the substituted day for the 5th of September, must be in the first year in which the Act comes into operation in the particular borough; and, secondly, that "all things required or authorised by this Act to happen or be done on any other day, or within any other time, from or before or after any day named in this Act, shall be done in the said first year on such other days, and within such other times as shall have, in point of time, whether prior or subsequent, the same relation to the day so ordered by the Lord Lieutenant instead of the 5th of September, as the day and time mentioned in this Act have to the said 5th of September." The result, then, of these conditions is—that the Lord Lieutenant, in selecting the day to be substituted for the 5th of September in the first year in which the Act comes into operation in any borough, must choose one so situated in that first year, as to admit of every day on which any thing is to be done falling within the said first year. The question, then, here is, has that been effected in this proclamation? and in order to determine it, the first consideration is as to the meaning of the terms "first year in which the Act came into operation." In Limerick it is either the calendar year 1841, or the municipal year beginning the 6th of September 1841—but which? We say the municipal; and if we shew that, then it is evident the proclamation is illegal; for the first day named in its schedule, and the first day on which any matter is to be done, viz., the 16th of August 1841, the day on which the tax-collectors are to open houses for the receipt of

(a) Cowp. 543.

(b) Wil. 395.

taxes, is outside of the first year; and so also is the greater part of the month following that 16th of August during which the taxes are to continue to be received.

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In order to ascertain the meaning of the words "first year," let us consider what is the meaning they have in the other sections where they are used. In the 39th section the 5th of September in the first year is spoken of: but in the 38th section it is enacted, that "after this Act shall come into operation in any borough, the guardians, commissioners, &c., who shall be entitled to receive, or cause to be collected any cess, rate or tax, the payment whereof is required by this Act for the purpose of entitling any occupier to be enrolled as a burgess, should, one calendar month at least before the 31st of August in each year, open or cause to be opened in some convenient place within such borough, an office for receiving payment thereat of such cess, &c." Now, the month prior to the 31st of August spoken of in this section, must be prior to the 5th September spoken of in the 39th section; but this 31st of August is desired to be after the Act comes into operation, and thus the 5th of September in the first year is shewn to be the 5th of September next after the Act comes into operation in the particular borough; in Limerick it would have been the 5th September 1842. The words "first year" did not mean the calendar year. The first year of her Majesty's reign would not be understood to be the year of our Lord in which it happened that she came to the throne, but the twelve months which succeeded the day on which she began to reign. The first year of a man's age is not the calendar year when his birth occurred, but the twelve months subsequent to the day he was born.

It is evident, then, that if the words "first year" be held to mean the corporate year, commencing in Limerick on the 6th of September 1841, this proclamation is not legal; since the 20th of September, the day substituted for the 5th of September, is not so situate in the first year as to allow of "all things required or authorised by the Municipal Act to happen or be done on any other day, or within any time from or before or after any day named in the Act, being done in the said first year."

This proclamation is also defective, the proceedings directed by it being premature. The qualification of the voter is defined in the 30th section to be, that he shall have been rated in respect of the poor-rate, and shall have occupied premises of a certain value, for the space of twelve calendar months at least next preceding the last day of August in any year. Now, in Limerick the first rate was struck on the 5th of September 1840, and, therefore, the qualification could not be completed earlier than the month of September 1841. At the time when the proclamation proposed to open houses for receiving those taxes, the payment of which was also part of the voters' qualification (viz., the 16th of August 1841), there was not a person qualified to be a burgess in Limerick.

T. T. 1842. The proclamation did not give the citizen the full time to acquire his franchise; he had neither his full time of rating or occupancy, nor had he as much time to pay up his taxes, or any arrears of them, as he should have had; his rights were abridged by this proclamation, and this, in itself, is sufficient to render it invalid and illegal; it was in order to prevent this occurring that the 211th section enacted that twelve months after a poor-rate, and not until then, the Act should come into operation in the borough. Both the reason of the case, and the express words of the 38th section, shew that section could not be put in force until after the Act came into operation in the borough, i. e., until after the 6th of September 1841. It is remarkable that the summary of the 212th section on the margin of the Act says, "Power to postpone the matters to be done on the 5th of September." If this be a correct interpretation, there would be an end of the relator's case, for then all the substituted days should have been at the end of the year 1842, instead of, as by the proclamation, at the end of 1841. But it is not necessary to go this length. It is enough that there are days (viz., the 16th of August and the days following it) on which, under the proclamation, there is to be done some municipal proceeding required or authorised by the Act—which are prior to the 6th of September 1841, the day on which the Act first "came into operation, commenced and was in force" in the borough of Limerick; *Quin v. Poor Law Commissioners* (a).

Mr. Pigot, Q. C., in reply.—The question is in fact narrowed to the effect to be given to the 38th section of the Act. The month spoken of in that section during which taxes are to be received from the burgesses, must, it is argued, occur after the 6th of September 1841: and because under the proclamation the month allowed for that purpose does not fall subsequent to that day, the proclamation and all the proceedings under its authority are illegal; now, some of the month does fall after that period, but about half does not. Is there then sufficient to render invalid the proclamation? Were the directions of the 38th section an indispensable part of the qualification of the burgess, there might be something in this objection; but they are not; the provisions of that section are merely directory; their non-fulfilment would not have prejudiced the right of a single burgess. Suppose in any borough the Act came naturally into operation, and that the proper persons neglected or refused to open houses for the receipt of taxes, surely this would not lessen the right of the burgess to his franchise. The section confers a privilege on the citizen by giving him an increased facility for paying his taxes; but surely that privilege, if through any accident he should be deprived of it, would not lessen his right to vote. Let us suppose the Act had come into operation

(a) 3 P. & D. 59.

on the 6th of August 1841, will any one contend it could not have taken its natural course, and that the mere fact that five days of the month for receiving taxes fell before the day the Act came into operation, would vitiate proceedings had under the Act? In like manner, the same thing occurring under the proclamation does not vitiate the elections. The curial part of the proclamation—the essential part—is that which names the 20th of September 1841, as the day to be substituted for the 5th of September, and that part is correct—for the 20th is subsequent to the 6th of September, and in the first year. This fulfils every condition which the other side require. The rest of the proclamation is admonitory, and it is a matter of no importance whether its directions bring the month for receiving taxes after or before the 6th of September 1841. Under any view of the case, an Act to remedy existing grievances, and establish a new municipal government for the boroughs of Ireland, is entitled to a liberal, expanded, and remedial construction.

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PENNEFATHER, C. J., on this day delivered judgment.

June 13.

In this case the majority of the Court are of opinion that the judgment should be given in favour of Mr. Vereker, and concur in the construction put upon the statute by his Counsel; but one member of the Court does not agree with the other three. On this, the last day of Term, and with such a press of business to engage the attention of the Court, we shall not be able to give the reasons of our opinion as fully as the great consequence of the case, and the difference of opinion between the Judges, would render desirable; but I may generally sum up the chief considerations which influence us in arriving at the conclusion I have stated. The question turns upon the construction of the 30th and 38th sections of the Act; and it appears to the majority of the Court, according to the true construction of those sections, that the time specified therein is material, and cannot be dispensed with; and that the statute in relation to the subject matter of these sections is not merely directory, but imperative, and forms part and parcel of the statute founded upon the considerations for which this Act of Parliament was passed. By the 30th section it appears that persons to entitle themselves to vote for burgesses, are obliged to establish a certain qualification; and the qualification to be so established and proved in favour of such voter, must be compounded of two several matters; first, occupancy; and, secondly, rating under the poor rate. We (the majority) do not think that although both the English and Irish Acts are on the same subject-matter, there is any analogy between them; the Irish Act must be considered by itself. Both Acts proceed on the same foundation—occupancy and rate paying; but there is a great difference between them; the rate being established and ascertained in England for some time, whereas in Ireland it is a new and untried qualification. Founded upon this great difference, there was no

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necessity for the delay in acting upon the English Act, which was required by the Irish Act, in order to ascertain the validity and extent of the qualification. The Irish Act has stated a time during which the rate paying should continue to be paid after the Act came into operation:—by the 30th section of the Act it is enacted, “That after this Act shall come into operation in every borough, every man of full age, who, upon the last day of August in any year, shall be an inhabitant householder, and who for six months previous thereto shall have been resident as such within such borough, or within seven statute miles of such borough, and who shall occupy within such borough any house, warehouse, counting-house, or shop, &c., which shall be of the yearly value of £10; provided always, that no such occupier shall be admitted to be enrolled as a burgess, or to vote at any election of Municipal Commissioners under this Act, unless he shall have been rated in respect of such premises to the relief of the poor, and shall have occupied such premises within the said borough, and been rated as aforesaid, for the space of twelve calendar months, at the least, next preceding such last day of August.” It must be a rating for twelve months before this Act shall have come into operation terminating on the last day of August in every year, and there was a good reason for that provision, because the Poor Law came into operation in Ireland much about the same time, and it therefore became necessary (not directory but imperative), that the rating should continue for twelve months before the Corporation Act should come into operation. In order to give time for the operation of this Act in Limerick, the consequence would be this;—the test (the payment of poor rate for twelve months) must expire before the 31st of August, in the year in which the Corporation Act would come into operation in that city; and the language of the Act would not have been complied with unless twelve months’ rating to the poor had been completed prior to the 31st of August, in that year in which the Corporation Act is brought into operation in that city. Now, when would that period arrive? In the city of Limerick (by the 211th section), the Commissioners of poor rate signified that the rate was to come into operation upon the 5th of September 1840; there should be then a rating for twelve months previous to the 31st of August, in some year before the Corporation Act could come into operation; that period was not completed therefore upon the 31st of August 1841, for twelve months from the time the rate was first imposed in the city of Limerick did not expire until the month of September 1841; and as there must have been a subsisting poor rate for twelve months prior to the 31st of August, before the Corporation Act shall have come into operation, it necessarily follows that that period could not have been completed until the 31st of August 1842. The necessary consequence of this construction is, that the proclamation and proceedings of the Lord Lieutenant have been too soon, and that they ought not to have taken place until the

year 1842. For adequate reasons and upon the same principles upon which the commencement of the Corporation Act was tested, namely, a period of twelve months prior to the 31st of August, after the Poor Law Act came into operation, we hold that the 38th section has precisely the same effect and operation. It is said also that this section must be taken to be only directory, because it would be inconvenient it should be otherwise. I do not think the inconvenience should be taken into consideration; the Court has no right to consider that as merely directory, which we find the Legislature has positively enacted; and even were it open to the Court, there is sufficient reason in the present instance to consider the language of the statute not directory, but imperative. The twelve months' rating—the criterion which the Act requires—ought, in my mind, to have been strictly adhered to, for two reasons; first, that the persons entitled to the franchise should have full time for the payment of their taxes; and secondly, that others may have an opportunity of opposing improper persons, who have merely fictitious qualifications, from obtaining the elective franchise. According to the view I take of this subject, I do not consider it a matter of direction, and therefore, in my opinion, this proceeding has been unwarranted by the Act, and Mr. Vereker's right is undisputed unless the old Corporation has been superseded, which has not been done. We, the majority of the Court, are therefore of opinion, that judgment must be given for the defendant.

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PERRIN, J.

Owing to the want of time and press of business occupying the Court, I will not state my reasons for dissenting from the opinions of the majority of my Brethren. I think Mr. Honan's title to the office of Mayor is established. The statute gives power to the Lord Lieutenant to accelerate the operation of the Act; I consider the 38th section merely directory, and I hold my opinions upon the questions involved in this argument, upon the grounds stated by Mr. Pigot in his able argument upon this case.

Demurrer overruled.

T. T. 1842.
Queen's Bench.

June 1.

CARNAGIE v. KIRBY.

In assumpsit by payee against maker of a promissory note payable in the body at a particular place; *Held*, that a promise by the defendant after it became due, to pay the amount of the note, was evidence of the debt under the money counts, and dispensed with the omission in the declaration of a special count averring presentment at the particular place, and with proof of such presentment.

ASSUMPSIT.—This was an action of assumpsit upon a promissory note, tried before the Lord Chief Justice at the Sittings after last Hilary Term. The note was made payable in the body of it in a particular place. The declaration contained two counts; first, a count upon the note, omitting to state the place where it had been made payable; the other was the common money count. It appeared in evidence that the note was a joint and several note, and was made payable in the body of it at the office of the National Bank, Tipperary; that payment had been demanded from the defendant after it became due, and on that occasion the note was presented to him; that he then admitted he owed the amount, and promised to pay it; it was also proved the defendant had no funds in the bank, but no evidence was given of its having been presented there. The defendant's Counsel called upon the learned Judge to nonsuit the plaintiff, there being a variance between the note proved in evidence, and that stated in the declaration; on the other side it was insisted that the plaintiff was, at all events, entitled to a verdict on the money counts, particularly on that for an account stated and settled, the defendant having admitted he owed the amount, and promised to pay it.

The learned Judge refused to direct a nonsuit, but left the case to the Jury, who found for the plaintiff.

A conditional order having been obtained to have this verdict set aside, and a nonsuit entered, pursuant to leave reserved at the trial—

Mr. John Brooks, Q. C., with whom was Mr. Cheyne, shewed cause. This was an action upon a promissory note, and the objection made at the trial was that there was no allegation in the declaration of the note being made payable at the place mentioned in the body of it; the learned Judge was of opinion that upon the first count we should be nonsuited, but that we were at liberty to give this note in evidence under the money counts; the note is for value received.—[CRAMPTON, J. Did you prove the consideration given for the note?—]No, but we proved that the note was presented to the defendant after it became due, and that he promised to pay it. It was clearly evidence under the count for money lent; *Bayley on Bills*, 357; 2 *Phil. Evid.* 15; where all the cases upon the subject are collected, the result of which is stated to be, that as between the original parties it is evidence of money lent, and is admissible as a paper writing, to prove the receipt of so much money from the plaintiff; *Sutton v. Toomer* (a); *Williamson v. Bennett* (b); *Lyon v. Sundius* (c).

(a) 7 B. & C. 416.

(b) 2 Camp. 419.

(c) 1 Camp. 425.

Mr. *John O'Hara, contra*.—This is not the case of a note drawn in the common form, but the contract has been qualified by its being made payable in the body of it at a particular place; the plaintiff not having averred in the first count of the declaration, that the note was payable at such place, there was a clear variance between the document proved at the trial, and that set out in the declaration, and he, therefore, could not recover on that count; the question, then, is, can such a qualified contract be given in evidence under the money counts? A note is not always evidence under the money counts; *Bird v. Legge* (a). If a qualification be inserted in the body of a note, it must be stated and proved. In *Dickinson v. Bowes* (b), Lord Ellenborough says—"It has been decided, if the particular place of payment be embodied in the note, it was part of the condition on which it was payable that it should be presented for payment at that place;" and in *Morgan v. Jones* (c), Vaughan, B., in giving judgment, says:—"Without further adverting to the cases, where between the original parties a promissory note is presumptive evidence of money lent, it is sufficient to say, that such presumption only arises in the case of a note payable in the ordinary way, that is, at all events, and is, therefore, rebutted by any matter on the face of the instrument which raises a directly contrary inference;" *Saanderson v. Bowles* (d); *Chit. Bills*. 577.

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Mr. *Cheyne*, in reply.—The subsequent promise by the defendant to pay the note when it was presented after it became due, dispensed with the necessity of presentment at the bank, and created a moral obligation sufficient to sustain the account stated: *Seago v. Deane* (e): it is there distinctly laid down that evidence of a promise to pay, at a period subsequent to the date of the document, was admissible, and properly received under the account stated; and in *Singleton v. Barrett* (f), Lord Lyndhurst says, "that what a party says admitting a debt, is evidence, notwithstanding the promise to pay is reduced to writing."

The COURT were of opinion that the subsequent promise of the defendant to pay the note, dispensed with the necessity of presentment, and, therefore,

Allowed the cause with costs.

(a) 7 D. P. C. 814.

(c) 1 Tyr. 30.

(e) 1 M. & P. 227.

(b) 16 East, 112.

(d) 14 East, 507.

(f) 2 C. & Jer. 369.

T. T. 1842.
Queen's Bench.

IN THE MATTER OF A PRESENTMENT MADE BY THE GRAND JURY
 OF THE COUNTY FERMANAGH.

June 6.

Where a presentment was made at a Presenting Sessions for enlarging a gaol, under the 7 G. 4, c. 74, and 6 & 7 W. 4, c. 116, and was subsequently approved of by the Grand Jury at the ensuing Assizes; *Held*, that such presentment did not come within the terms of the 27th and 28th sections of the latter Act, and that after it had been approved of by the Grand Jury at the Assizes, it was not necessary that it should again be laid before the Magistrates and cess-payers at the Sessions for their approval.

In this case a conditional order had been obtained, that a writ of *certiorari* should issue to the Judges of Assize and Clerk of the Crown of the county of Fermanagh, directing them to return into this Court a certain presentment made by the Grand Jury of said county at the Summer Assizes of 1841, concerning the enlarging the gaol of Enniskillen, and all papers relating thereto.

The affidavit of Henry Armstrong, a cess-payer, made in support of the order, stated, that at the Spring Assizes of 1840, a resolution had been entered into by the Grand Jury, to have plans and estimates prepared for enlarging the gaol of Enniskillen, and that same when prepared should be laid before the cess-payers at the next Road Sessions for their approval, previous to being submitted to the Grand Jury; that in pursuance of such resolution, such plans and estimates were prepared, and an application made to the Magistrates and cess-payers at the Sessions that a sum not exceeding £7500 should be raised on the county at large, and a presentment for such purpose should be made under 6 & 7 W. 4, c. 116, s. 124, and 7 G. 4, c. 74, s. 11; that such application was approved of by the Magistrates and cess-payers, and that at the Summer Assizes of 1841 the Grand Jury made a presentment for the said sum of £7500, and appointed Commissioners for carrying it into effect, and that such presentment was *fiated* by the Judge. The affidavit further stated, that the original application had never again been laid before the first meeting of the Presentment Sessions holden first after the said Assizes, or any other subsequent Sessions, nor were any maps or specifications in respect thereof laid before said Sessions or the Justices and cess-payers for their consideration, but such presentment was made and *fiated* without any reference to said last mentioned Presentment Sessions, as required by the provisions of the 6 & 7 W. 4, c. 116; that such presentment was illegal, and made without authority, and contrary to the provisions of said Act; for that it is thereby required that the original application for such presentment should have been first certified and approved of by the Grand Jury, and afterwards remitted to the first Presentment Sessions, before any valid presentment could be made thereon.

Mr. *Sheil*, with whom was Mr. *Sproule*, shewed cause.—The objection made to this presentment is, that the application upon which it has been grounded has not been certified by the Grand Jury, and returned to the

Presenting Sessions for approval before it was finally confirmed; now, we contend, under the provisions of the Gaol Act (7 G. 4, c. 74), such a course of proceeding is not necessary; the 11th section of that Act enables the Grand Jury to present such sum as shall be deemed necessary for the repair of or to supply any deficiencies in the gaols, either by enlarging or altering the same, or providing a new prison in lieu thereof; and the 18th section enables the Grand Jury, when any such presentment shall have been made, to appoint Commissioners to carry such presentment into effect; and by the 19th section, those Commissioners, when appointed, are directed to give notice of such presentment having been made, and section 20 enacts, that it shall not be lawful for any Grand Jury or Commissioners to begin to build, or rebuild, or alter, or enlarge any gaol, &c., until the plan and site thereof, and the contracts upon which the same is proposed by the Commissioners to be executed, shall, after being previously approved of by the Grand Jury, be submitted to the Lord Lieutenant for approval; these are the material sections in this Act in reference to such presentment, and we have complied with all the directions contained therein; but there is nothing in them which requires such presentment to be returned to the Magistrates and cess-payers at the Sessions, for their approval; but it is argued, that under the provisions of the 6 & 7 W. 4, c. 116, ss. 27 and 28, this presentment should be approved of a second time by the Magistrates and cess-payers at the Sessions; those sections do not extend to presentments for the building or enlarging of a gaol; and the 124th section of that Act enacts, that nothing therein contained shall be construed to limit the powers of Grand Juries to make presentments, which they are authorised to do under the 7 G. 4, provided the application for such presentment shall have been made and approved of at the Presentment Sessions in manner therein directed. This section recognises the 7 G. 4, and the only limitation put to proceedings under such Act is, that they must be approved of by the Magistrates at Sessions in manner therein directed, all which has been done in this case; but it does not require them to be certified by the Grand Jury, or returned to the Sessions for approval. If the construction of the other side be correct, it would supersede the powers vested in the Commissioners by the 7 G. 4, and vest those powers in the Magistrates and cess-payers at the Sessions.

T. T. 1842.
Queen's Bench.

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PRESENT-
MENT.

Mr. Boyd, contra.—By the 17th section of 6 & 7 W. 4, in the ordinary works, applications are to be decided at the first Sessions, or an adjournment thereof; but when the expense exceeds the sum of £50, the Legislature have required there should be more time for deliberation: on the original presentment being made, the Magistrates are entitled to deal with it as they think proper, but if they adopt it, it must be brought before the Grand Jury, and certified by them: 27th and 28th sections

T. T. 1842.
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regulate all public works of every description exceeding £50; and the 124th section is to be considered with reference to those sections. The concluding paragraph of the 28th section provided that the tenders and proposals therein mentioned, shall be opened at the first adjournment of such Sessions to be made for opening sealed tenders and proposals, and thereupon applications and all tenders and proposals relating thereto shall be subject to such and the like regulations, in all respects, as other applications and other tenders and proposals are subject under the Act; and the 124th section expressly refers to sealed tenders and proposals, in reference to all contracts which the Grand Jury are authorised to make, and refers to the approval of such at the Presentment Sessions generally. —[PERRIN, J. The Grand Jury do not enter into a contract for the building of the gaol, but they enter into other contracts.]—By the course they seek to pursue, the cess-payers would have no means of opposing this presentment: the 27th section must be held to extend to the building of a gaol, for it uses the words “house or other building.”—[PERRIN, J. The Gaol Act empowers the Grand Jury to present.—CRAMPTON, J. In fact the 124th section is as strong as if nothing were said in the 27th section.]—The Gaol Act should be construed with reference to the 27th and 28th sections.

CRAMPTON, J.

If so, we should expunge a portion of the 124th section, which clearly overrides the 28th section; you have failed to shew this case comes under the provisions of the 28th section.

The cause shewn, therefore, must be allowed, with costs.

T. T. 1842.
Queen's Bench.

SMITH v. BLAIR.*

June 22.

MR. THOMAS GRAYDON moved that the plaintiff might be at liberty to amend the declaration in this cause, without prejudice to the rules to plead, upon the terms of plaintiff undertaking to pay the costs of the special plea filed by the defendant, and the costs of the amendment, and to amend the defendant's copy of the declaration; and further consenting that the defendant should be at liberty to file any issuable plea he might be advised, on or before twelve o'clock on Thursday the 23rd of June, or within three days, provided defendant would take short notice of trial. This was an action brought upon a bill of exchange by the plaintiff, as as Manager of the Western Bank of Scotland; the declaration contained a count upon the bill and the money counts; and in engrossing the declaration, through a mistake of the clerk, the word "Louth" had been written instead of "Scotland." To this declaration the defendant had pleaded the general issue, and also a special plea, averring that the plaintiff had not been returned to the Stamp Office in Dublin, as the public officer of the said Banking Company, or registered as such.

A plaintiff will be allowed to amend a declaration without prejudice to the rules to plead, where the error sought to be amended was a mere clerical one. The Court will allow an affidavit to be read in support of a motion, although not filed at the time of the service of the notice, if a copy be served with the notice.

This plea, as the declaration is at present on the record, would be a good plea, and we could not go to trial upon it; we are, therefore, compelled to amend, and as it is a mere clerical error, we are entitled to this amendment upon the terms we have offered; *Wilkinson v. Rogers* (a); *Gaw v. Dunlop* (b); *Lessee Kelly v. Byrne* (c). The defendant has made no affidavit of merits, and this plea has been filed for the purpose of preventing our having a trial at the ensuing Assizes.

Mr. *Keller, contra.*—There is a preliminary objection to this motion; the affidavit made in support of it was not filed at the time notice of the motion was served, but a copy was served on the defendant with the notice, the affidavit was not filed until the following day.

[BURTON, J.—There is nothing in that objection, it is the common practice of the Court to allow such affidavit to be read; the only difficulty I see is this: defendant gives liberty by his notice to file any plea, but then he limits the plaintiff until twelve o'clock on the 23rd of June.]

Mr. *Graydon*—We could not otherwise have a trial at the next

* *Coram* Burton, J., in Chamber.

(a) 1 Smy. 263.

(b) Bat. 435.

(c) 5 Law Rec. N. S. 72.

T. T. 1842. Assizes, that day being the last for serving notice ; but the defendant is not entitled to file any plea, having already pleaded the general issue.

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Mr. *Keller*.—This is a substantial plea to the merits, the plaintiff is merely a nominal person, and it was necessary for us to see that there was some person who would be responsible for the costs ; the plea gives an answer to their declaration, and is quite true. The defendant should not be compelled to plead issuably, the mistake having occurred in consequence of their error ; there are several errors in the declaration which we would be entitled to take advantage of on special demurrer. As to affidavits of merits, we had not sufficient time to make one ; their affidavit to ground this motion not having been served in proper time. According to the practice of the Court, this amendment will not be allowed without prejudice to the rules to plead.

BURTON, J.

If these errors were in the declaration, you should have demurred specially in the first instance ; having pleaded the general issue, I cannot allow you now to take advantage of these errors ; generally speaking, the Court will not allow an amendment without prejudice to the rules to plead, but this is so manifest a clerical error, I cannot allow the rules to be served anew. Let the declaration, therefore, be amended in this particular, the defendant to plead issuably in three days. If plaintiff seeks any other amendment, it must be without prejudice to the rules to plead.

Motion granted.

T. T. 1842.
Queen's Bench.

DAWSON v. BRITTAN.

June 2.

MR. MACDONAGH shewed cause against a conditional order obtained on the 9th of May, to set aside the parliamentary appearance entered for the defendant on the 20th of April, the declaration filed thereon on the 27th of April, and the rules to plead; on the ground of irregularity: and that the defendant should have liberty to plead to said declaration.

It appeared the writ was tested on the 31st January, and returnable on the 14th of April; that the 19th of April was the last day for entering an appearance to such writ; that the defendant's Attorney had entered an appearance thereto on the 8th of April, but did not serve notice thereof until the 20th of April, and until a parliamentary appearance had been entered by the plaintiff's Attorney.

A plaintiff is entitled to enter a parliamentary appearance for a defendant, even although an appearance had been entered by the defendant at the time, unless notice of such appearance be served in pursuance of the 103rd Rule of the Court.

Mr. *Macdonagh*, contended that the plaintiff's proceedings were perfectly regular; that an appearance entered in Vacation had reference back to the antecedent Term; and the appearance should not have been entered in that Term, but in the Term in which the writ was returnable; 1 *Ferg. Prac.* 208, 210. The defendant did not serve notice of the entry of the appearance until we entered a parliamentary appearance and filed our declaration. By the 103rd Rule* of this Court, notice of appearance must be served, otherwise the appearance is a nullity; *Moor. & Low. Rules* 166.

Mr. *Otway, contra.*—The plaintiff was bound to search from the time of the teste of the writ, to see if an appearance had been entered, before he entered a parliamentary appearance. The plaintiff not having complied the consent which we served on the 5th of May—whereby we offered to pay the costs of the parliamentary appearance, on the terms that we should be allowed to plead on foot of the appearance entered by us on the 8th of April—is not entitled to carry this motion.

Mr. *Macdonagh*.—We could not comply with this consent, for they

* RULE 103.—28th April, 1804.

ORDERED—That when the defendant's Attorney enters an appearance, except in the case of a parliamentary appearance, he shall serve the plaintiff's Attorney, either in person or at the place of his registered residence, with notice thereof, or in default thereof, such appearance shall be considered as null and void.—Vide *Price v. Flattery*, 3 Ir. Law Rep. 499.

T. T. 1842. then could have demurred to our declaration for being entitled in the
Queen's Bench. wrong Term ; *Copeland v. Langan (a)*.

DAWSON

v.

BRITTAN.

Per Curiam.

The 103rd Rule appears quite decisive ; you should have served notice of the appearance ; and, therefore, the cause must be allowed with costs, with liberty for the defendant to appear and to change the parliamentary Attorney, and plead forthwith.

Rule discharged.

(a) Ir. T. Rep. 509.

1842.
Common Pleas.

SISSON v. COOPER.

(*Common Pleas.*)

Easter Term.
May 7.

MR. JOHN WALSH moved to make absolute a conditional order, that the proceedings in this cause be stayed until the plaintiff had given security for costs. The affidavit of the defendant stated that the plaintiff had gone to reside in Canada some years since, and only came to this country on occasional visits. It also appeared that the defendant had received a letter from him since the commencement of the suit, dated from London, stating his intention of returning to Canada as soon as the present suit was settled.

Where a plaintiff who resides abroad, but has property in this country, has been in the country since the commencement of the suit, and swears that it is his intention to prosecute the action, and to remain here until it is settled, the Court will not require him to give security for costs.

Mr. Mansergh and Mr. Whiteside.—The plaintiff has been in England since the commencement of the suit, and in Dublin ever since the filing of the declaration, and swears that he is possessed of considerable property in and about the city; and that he intends prosecuting the suit, and remaining here until it is settled. This brings us within the very terms of the rule as laid down in *Ferguson's Pract.* 901—"If a plaintiff comes to reside within the jurisdiction, whether temporarily or not, the Court will not require him to give security for costs, so long as he continues within the jurisdiction, if he swears to his intention to reside here until the suit has been settled;" *O'Neill v. O'Neill* (a); *Jones v. Head* (b); *Dowling v. Hannan* (c).

Mr. Walsh, in reply.—An allegation of having property in the country is no answer to our application, as we lose the ready and expeditious remedy of attachment. As to the rule laid down in *Ferguson's Pract.*, it is obviously too general. He has entirely overlooked the case of *Oliver v. Johnson* (d), where a plaintiff, who had no permanent residence in England, was ordered to give security for costs, although he was in the country at the time of bringing the action, and had sworn that he had no intention of leaving it.

Per Curiam.

The case is too plain on the authorities for discussion. We must, therefore,

Allow the cause shewn, with costs.

(a) 6 Law Rec. N. S. 159.

(b) 2 Law Rec. N. S. 78.

(c) 8 Dow. P. C. 165.

(d) 1 D. & R. 560; S. C. 5 B. & A. 908.

E. T. 1842.
Common Pleas.

REGAN in replevin, v. FRANCIS.

May 7.

The parties having entered into a consent, which was made a rule of Court, that the proceedings should be stayed, on the terms of the plaintiff investing one moiety of the arrears and accruing rent for certain specified purposes, and paying the other moiety to the defendant; *Held*, that the Attorney for the defendant had no lien on the accruing rent for his costs. The Court ordered the Attorney to pay the costs of the motion, it appearing that the bill of costs was large and *untaxed*, and only a small balance due on foot of it.

THIS case came on to be tried in June 1841, when it was agreed by and between the Counsel on either side, that a juror should be withdrawn, and the proceedings stayed, on the terms (among others) of the plaintiff paying over half of the arrears, and of the accruing rent, for the next six years, to be vested in trustees as an indemnity to the plaintiff against certain claims of third parties; and the other half of the same to be paid over to the defendant. This agreement was carried into effect, and made a rule of Court. The Attorney for the defendant had served a notice in November last on the plaintiff, not to pay the amount of the accruing gales to the defendant, or to any other person, until his lien for costs on the same had been discharged. Notwithstanding that notice, the plaintiff had paid the half year's rent due on the 23rd of March last, to the parties pointed out in the order.

Mr. C. H. Walker now moved the Court, that the plaintiff be directed to pay over to the Attorney for the defendant, out of the rents directed to be paid (under the order of compromise) by the plaintiff to the defendant, on account of the balance still due on foot of the costs in the cause; and for the costs of the application. An Attorney has a lien upon a sum awarded to his client, as well as if the same had been recovered by judgment; and if paid over after notice, he may compel a repayment of it to himself; *Ormerod v. Tate (a)*; and if an award would not deprive an Attorney of his lien, so neither would a compromise.

Per Curiam.

No doubt, the Attorney has a general lien on a sum awarded to his client; but we have, in this case, a special allocation of the rent, reserved in this order which has been made a rule of Court; and if the plaintiff had not paid the rent, as arranged and pointed out in that order, to the defendant, she would have been liable to an attachment. The defendant's Attorney, if he was desirous of preserving his lien on this fund, ought not to have allowed his client to take such an order, or to have introduced a saving of his rights. We cannot, therefore, interfere.

Mr. J. D. Fitzgerald, who appeared on behalf of the plaintiff, stated that £90 had been allocated on the compromise, and paid over to the defendant's Attorney, on foot of these very costs; and, on his own

(a) 1 East, 464.

shewing, a small balance of only £8 remained due—and that too, on an *untaxed* bill of costs.

E. T. 1842.
Common Pleas.

REGAN
v.
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Per Curiam.

This motion must be refused, with costs, to be paid by the defendant's Attorney, who ought never to have come into Court with so small a balance due on so large an *untaxed* bill of costs.

No rule.

KELLY v. CLARKE.

Trinity Term.
May 22.

MR. T. HENN applied for liberty to issue execution on foot of a judgment entered up to secure payment of an annuity. The judgment was entered in 1818, revived in 1823, and again in 1828, on suggestion of breaches. The plaintiff had died, and the application was on behalf of his executors, who had revived the judgment in 1836. The defendant was alive, and was now resident in America, having left this country in 1824, although he had returned in the meantime, and had remained here for six years. No payment had ever been made, nor had there been any acknowledgment of the liability, nor was it sworn, or alleged, that the defendant had any property in this country.

The Court would not allow execution to be issued on a judgment collateral to secure an annuity, which was more than 20 years old, and no payment or acknowledgment, although it had been revived in the meantime, the defendant being resident in America, and having no property in this country.

DONERTY, C. J.

We do not see, under the circumstances as set forth—the defendant having left the country eighteen years ago, and having been resident here during six years of the intermediate time, when no fruits of this security were realised—how our order could be in any way effectual, as the plaintiff is not cognizant of there being any property of the defendant in the country which could be attached. We must, therefore, say

No rule.

T. T. 1842.
Common Pleas.

Lessee HASTINGS v. CASUAL EJECTOR.

May 22.

A tenant was served with an ejectment on the title, but died before he had taken defence, and judgment was marked. The Court would not set aside the judgment, and allow the widow of the deceased tenant to take defence, before she had taken out administration.

THIS was an ejectment on the title, and the tenant in possession died, after service of the ejectment, but before he had taken defence, and judgment had been marked.

Mr. *J. A. Curran* now applied, on behalf of the widow of the deceased tenant, and who was now the occupier of the premises, that the judgment should be set aside, and that that she should be admitted to take defence. The marking of judgment without leave of the Court, was, at all events, irregular, by reason of the suit having abated; *Lessee Aylmer v. McNeill* (a). The tenant in possession claimed under an unexpired lease for years.

Mr. *R. Chambers Walker*, *contra*, contended, that even if their were a subsisting lease, the party applying did not shew any legal title to come into Court, not having taken out administration to the deceased tenant. Parties applying to take defence must state their title distinctly, and this application is analogous in principle; *Lessee Darcy v. Casual Ejector* (b).

DOHERTY, C. J.

A party making such an application must shew herself connected in title with the deceased tenant. The connexion here set out is nothing more than the accident of being in the house of the tenant at the time of his death, which is clearly not sufficient. You must prove to us that you have a right to be heard in Court, and as soon as you take out administration you may come in for that purpose—not sooner.

No rule.

(a) Cr. & Dix, 368.

(b) 4 Law Rec. N.S. 126.

T. T. 1842.
Common Pleas.

FAIR v. RUTLEDGE.

May 24.

THIS was a plea of *nul tiel record* to a *scire facias* brought to revive a judgment. The *scire facias* recited that the plaintiff "late in the Court "of Lord George the Fourth, late King of the United Kingdom of "Great Britain and Ireland, &c., to wit, in Trinity Term in the sixth year "of his reign, before John Lord Norbury and his Brethren, *our Justices* "of *our Common Bench*, &c., recovered against the defendant, as well a "certain debt of £2000, as £2. 1s. damages," *prout patet*. It then went on to pray execution against the defendant "for the debt and damages aforesaid, according to the recovery aforesaid."

A *scire facias* stated a judgment of 1825 for £2000, and £2. 1s. damages, recovered in the Court of the late King George the Fourth, before *our Justices*; *Held*, not to be a variance, either in the description of the Court, or in the statement of the amount of the judgment.

Mr. Fagan, objected to the description of the Justices of the Court before whom the judgment was recovered, as "*our Justices*," when in the immediately preceding sentence they are described as of the Court of Lord George the Fourth, the late King.—[TORRENS, J. How would you describe them, supposing that some, if not all, of the Judges of the present Court, happened to have been Judges at that time?—It is not necessary to mention the Judges of the present Court at all, but only the Judges of the Court in which the judgment was recovered. There is also a variance, in stating in the *scire facias* the sum to be £2000 of the present currency, when it was recovered in Irish currency.

Mr. Nolan.—With respect to the description of the Court, the variance, if any, is immaterial. It has been decided, that where "the record had "date, &c., in words at length, and 'George now King,' and the replication had the date and figures, and also in words at length interlined "and 'George the Second now King,' it was no variance, for the figures "and 'the Second,' shall be rejected as surplusage:" 7 *Com. Dig. Record, D.*, p. 210. So in this case the word "our" may be rejected as surplusage, and there can then be no objection. As to the other point, it has been settled to be no variance; *Lanoaze v. Carthrew* (a).

Per Curiam.

As to the first point, there is nothing incorrect in the recital, as we are Justices of the Crown, no matter who may be the reigning Sovereign; and the Crown never dies. The other point has been ruled long since not to be a variance; as a *scire facias*, in stating a judgment of 1825, must be taken to speak of the currency of that period.

(a) Bat. 733.

T. T. 1842.
Common Pleas.

WHITE v. KIDD.

May 28.

A party having been arrested on a writ, which turned out not to have been indorsed, as required by the 43rd General Rule, and having, while in custody, filed a petition under the Insolvent Act, which he afterwards abandoned, but on which one of his creditors was applying for an assignee—the Court would not discharge him out of custody.

MR. MACDONAGH moved that the defendant be discharged from custody, the writ on which he was arrested not having been indorsed, as required by the 43rd General Rule.

Mr. *B. Keller* opposed the motion, on the ground that the defendant had filed a petition in the Insolvent Court, and that there was an application now before that Court for the appointment of an assignee under it.

Mr. *Macdonagh*.—The petition was filed in March 1841, the property of the defendant being under a receiver in the Court of the Chancery; but he took no further steps, nor did he file any schedule—in fact, he abandoned his proceedings. The application to have an assignee appointed was made by a creditor in March last, without the privity or assent of the defendant.

DOHERTY, C. J.

We must say no rule on the motion; but it is not a case for costs.

Let the motion be refused, without costs.

DANIEL M'NEVIN v. HENRY DOLPHIN, and the heir and
 tertenants of ANTHONY DOLPHIN.

May 24.

A *scire facias* issued against a surviving conusor, and the heir and tertenants of the

deceased conusor, and prayed execution against the former generally, and against the lands which were of the latter, &c.; and the Sheriff at the conclusion of his return certified that, "at the time of the rendition of the within judgment or at any time afterwards, during the lifetime of the said A. D., that there are not, nor were there any heir or heirs of the said A. D., nor were there any tenants of any other lands or tenements which were of the said A. D., at the time of the rendition of the said judgment, or at any time afterwards, within my bailiwick, to whom I could make known, as by the within writ I am commanded." Held, that there was no misjoinder in the said writ, and that the prayer of execution was not irregular. Held also, that the Sheriff's return was bad, in having restricted the return of the tenants to those who were tenants of the lands during the life of the deceased conusor.

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Henry Dolphin—that execution yet remained—and Anthony Dolphin had since died. It then commanded the Sheriff to make known to the heir of the said Anthony Dolphin deceased, and also to the tenants of all the lands and tenements in his bailiwick, of which the said Anthony Dolphin deceased, or any person in trust for him, was or were seized at the time of the rendition of the said judgment, or at any time afterwards; and also to the said Henry Dolphin, that they and each of them be before the Justices, &c., that is to say, the said heir and tertendants, to shew if they have or can say any thing for themselves, why the debt and damages should not be levied of the lands which were of the said Anthony Dolphin at the time of the rendition of the judgment, or afterwards; and the said Henry Dolphin if he has or can say any thing for himself, why the said conusee should not have execution against him for the debt and damages aforesaid, &c. The *scire facias* then set out the Sheriff's return; that he had made known to Paul D., Peter D., and Oliver D., heirs-at-law of the within named Anthony Dolphin, and to certain persons (whose names were set out), as tenants of certain specified lands, which said lands "were of the within named Anthony Dolphin at the "time of the rendition of the judgment, or afterwards in his lifetime, "&c.;" and also that he had made known to the within named Henry Dolphin, that they and each of them be before the Justices, &c. And he further certified that "at the time of the rendition of the within "judgment, or at any time afterwards, *during the lifetime of the said* "Anthony Dolphin, there are not, nor were there, any heir or heirs of "the said Anthony Dolphin; nor were there tenants of any other lands "or tenements which were of the said Anthony Dolphin, at the time of "the rendition of the said judgment, or at any time afterwards, within my "bailiwick, to whom I could make known, as by the within writ I am "commanded, &c."

To this *scire facias* one of the tertendants demurred specially, assigning as causes—First, that the *scire facias* was issued to recover the debt and damages of the lands which belonged to Anthony Dolphin, and also of Henry Dolphin generally, which two matters are repugnant and inconsistent, and could not be joined in the same writ of *scire facias*; and that distinct writs of *scire facias* should have been issued against the heir and tertendants of Anthony Dolphin, and against Henry Dolphin. Second, because it does not appear that the Sheriff has summoned all the tenants of the lands and tenements which were of the said Anthony Dolphin; or that there was or is no other tenant of the lands and tenements which were of the said Anthony Dolphin, within the bailiwick of the said Sheriff, save the said tenants in the said return mentioned.

The said Henry Dolphin, the surviving conusor, also demurred specially, and assigned, as special causes—First, the same as the first of the foregoing causes; and, Second, for that he should only have been

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required to shew cause, why the debt and damages should not be levied of his goods and chattels, and a moiety of his lands; and should not have prayed execution against him personally.

Mr. *J. D. Fitzgerald*, in support of the demurrers.—The prayer of execution in the *scire facias* is informal and improper, in praying execution against the surviving conusor generally, and against the lands of the deceased conusor. The plaintiff ought to have elected to take his remedy against one or the other; either to have proceeded against the surviving conusor personally, on the legal remedy or charge resting on him by survivorship, or against the heir. If he elects to proceed against the latter, the *scire facias* ought to have been framed in a modified form against the lands of the deceased person, and the lands and goods of the survivor; and not, as in this case, against the lands of the deceased conusor, and the person of the survivor. When the lien is resorted to, the remedy against the person is abandoned. Another cause of demurrer is, that the Sheriff's return certifies, that *during the lifetime of Anthony Dolphin* there were not any other tenants of lands which were of the said Anthony Dolphin, thereby limiting and restricting the return to tenants of lands of Anthony Dolphin, who were tenants *during his lifetime alone*, and not bringing it down to the time of this suit. Consistent with this return, there might have been tenants, who became such, since the death of Anthony Dolphin.

Mr. *M'Nevin*, Mr. *Macdonagh*, and Mr. *Monahan*, Q. C., *contra*.—With respect to the last objection, the words "during the lifetime," apply only to the return of the heirs of the deceased conusor, and as such they may be rejected as mere surplusage. At all events, it would be matter for plea in abatement, to say that there were other tenants not served. Moreover, it is not open to a defendant to demur to the return of the Sheriff.—[*Per Curiam*. It is every day's practice to do so, as it is a part of the record.]—The other two points to be argued, and to which alone the demurrer of the surviving conusor is pointed, are—first, as to the misjoinder of parties in the writ; and second, as to the informality and repugnancy of the prayer of execution. As to the first—it has been frequently settled since the days of Holt, C. J., down to the present time, that where the judgment is joint, so should be the *scire facias*, including the same parties, if living; and if one be dead, including with the survivor, those who represent that interest of the deceased, which was liable to be affected by the judgment. In this case, the bond was joint, the judgment was joint, and the *scire facias* is general as to the survivor, against whom our remedies are general, and including the heir and tertenants of the lands of the deceased—the judgment surviving only as to the personalty, and affecting only the lands of which the deceased

was in possession at the time of, and subsequent to, the rendition of the judgment; 2 *Wms. Saund.* 72, *d.* That this is the proper course, has been conclusively settled by the case of *Panton v. The Tertenants of Hall* (a). And, in the late case of *Keegan v. Deakin* (b), this Court, after having expressed some doubt upon the subject, gave its sanction to the propriety of a writ issuing in this form; *Kelly on Sci. Fa.* 54. There is no precedent to be found for any other than a joint writ under these circumstances, either in this country or in England. The lands of all must be made liable, where the proceedings are taken against the real lien, all being in *equali jure*; *Lampton v. Collingwood* (c); and, therefore, it was absolutely necessary to have the survivor before the Court, and for that purpose to issue a joint writ; 1 *Archb. Chit.* 444. As to the second point, regarding the informality of the prayer of execution, we submit that the prayer is correct. For, suppose even that we are not entitled to any but a specific execution, viz., against the goods of the survivor and the lands of both, the Court will presume that we asked in our pleading for nothing more than that which we have a right to; as we only ask the surviving conusor to shew cause why execution should not be had against him, according to the force and form of the recovery, *i. e.*, such execution, as by the judgment the law gives us. Before the late Act 3 & 4 *Vic.* c. 105, a moiety only of the lands was extendible, and yet it was held that the prayer of execution in a *scire facias* need not have been confined to a moiety; *Carroll v. Cooke* (d). The Court will grant the appropriate execution whether prayed or not, as in the case of *Rawson v. Hinds* (e). In *Smarte v. Edsam* (f), it was ruled that a *fi. fa.* was issuable against the survivor; and also in *Harbert's case* (g); and there is no authority overruling these cases. But, not only is the prayer correct, but any other would have been inadvisable; because if we had limited it to the lands of the survivor, we should have thereby abandoned, and been foreclosed of, our remedy against the person and personalty, which are part of our security.

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Mr. *Napier*, in reply, was desired to confine himself to the two points raised by the demurrer of Henry Dolphin, the surviving conusor. This demurrer must be decided with us, on principle, on precedent, and on direct authority. A party, under circumstances like the present, has two remedies, but he cannot resort to both of them at the same time. He may have a remedy against the lands of both, or against the survivor personally; but there is no instance of the double remedy being taken

(a) *Carth.* 107.

(b) 4 *lr. Law Rep.* 15.

(c) 4 *Mod.* 316.

(d) 1 *J. & S.* 33.

(e) 1 *H. & B.* 599.

(f) 1 *Lev.* 30.

(g) 3 *Co.* 40.

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against both, to prevent a foreclosure, as stated by Counsel on the other side. My proposition is the same as laid down in *Kelly on Scire Facias*, p. 55, that "Although judgment survives as to personalty, it does not as to real estate; for at common Law, the plaintiff might take the goods of the survivor by a *feri facias*, but the plaintiff, under the the statute, *Westm. 2*, must sue out an *elegit* against the lands of the survivor, and the heir and tertendants of the deceased." As to precedents, Holt, C. J., in *Panton v. Tertenants of Hall (a)*, said this was a judicial writ, and might be framed upon the special matter, and the form he laid down was this:—"That the writ should be against J. H. (the survivor), to shew cause why execution should not be had against him *de bonis et catallis*, and of a moiety of the lands, and against the heir and tertendants of B. (the deceased conusor), to shew cause why the plaintiff should not have execution of a moiety of the lands, without mentioning any goods. *Quod nota.*" Thus we have as a precedent, the writ that ought to have issued in this case, framed by Holt, C. J., himself, and followed in all the text books down to the present day; *Arch. Chit.* 824; *Preced. Arch. Chit.* 492. It is also adopted by Serjeant Williams in *2 Wms. Saund.* 72, n.; and by Comyns, C. B., in *6 Com. Dig.* 523. Such, therefore, being the usual form in all the books, if a party departs from it, he does so at his peril.—[*Per Curiam.* Holt, C. J., only says, that the form may be used, but he does not say that another form might not be as good.]—Lastly, we have direct authority in an *Anonymous case*, reported in *12 Mod.* 254, where it is laid down by the Court, that the writ ought to be "*de terris et tenementis* of the deceased; and *de terris et tenementis et catallis* of the survivor." *Rawson v. Hinds*, although cited by them, is an authority in our favour, as the plaintiff, in his replication, abandoned the execution against the person and goods, which proves that when the execution is against the defendant, it means every species of execution; and their own argument as to being foreclosed, is against them; for it shews that they reserved a power of personal execution, to which, it is admitted, they have no right. They, in fact, put it upon the Court to do that for them which they ought to have done for themselves.

DOHERTY, C. J.

As to the second cause of demurrer by the tertenant, we agree with the defendant's Counsel, that the words at the commencement of the negative part of the Sheriff's return, viz., "during the lifetime of the said Anthony Dolphin," govern and restrict the whole sentence. It is a departure from the usual form, and the pleader did so at his own peril. We must, therefore, allow the demurrer taken by the tertenant, with

(a) *Ante.*

liberty for the plaintiff to amend as he may be advised, on payment of costs. As to the other questions, which have been raised by the demurrer of Henry Dolphin, the surviving conusor, it is unnecessary to go into detail, or to say more than that the demurrer must be overruled.

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TORRENS, J.

The precedent proposed by Holt, C. J., is a very excellent one, but he is very far from saying that it is the only form that would be good. You must appeal to precedents in this country, as there is very frequently a great difference between those in use here and in England; and you have not shewn us that this *scire facias* is framed contrary to the precedents in the Irish Courts.

BALL, J.

It strikes me, that if the argument for the defendant is well founded, it would deprive the plaintiff of his right to issue a *feri facias* as well as a *ca. sa.*

Let the demurrer of the defendant, Henry Dolphin, be overruled; and let the demurrer of James Lowry, the tertenant, be allowed, with liberty for the plaintiff to amend the *scire facias* as he may be advised, on payment of the costs of the demurrer and of the amendment.

HAWARD v. MASON.

May 28.

MR. CLOSE applied for liberty to amend a *scire facias*, which had been specially demurred to, for not making profert of letters of administration with the will annexed, but merely of letters of administration. The defendant was served with a consent, and a notice offering to pay the costs of the amendment.

Mr. Ferrard, *contra*.—The consent furnished did not contain an offer of the costs, although the notice did; and we complain that we should thereby have only the security of the Attorney, and not of the plaintiff.

DOHERTY, C. J.

The question is, whether taking the notice and consent together, sufficient was not offered; and whether the Court will encourage such

When a plaintiff served a consent to be allowed to amend, which did not contain an offer of the costs, and also served a notice of motion for the same purpose, which did contain an offer to pay the costs—the Court granted the motion, but without costs to either party.

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motions by separating them. The plaintiff should have offered in his consent to pay the costs; while, on the other hand, the defendant might, and ought to have called upon the plaintiff to alter the consent in respect of the offer of the costs. Our order is, that the plaintiff be at liberty to amend in the terms of the notice served—and no costs of this motion.

June 8.

Executors LANGTON v. MASSY.

The Court ordered substitution of service on the land agent of the conusor who resided abroad, where the amount of the judgment was small, and the expense of attempting personal service would have been great.

MR. ROBERT FERGUSON moved for substitution of service of a *scire facias* on the land agent of the conusor of a judgment—the plaintiff having been informed by the said land agent, that the defendant was residing out of the jurisdiction, at Dinon in France.—[DOHERTY, C. J. This Court never gives an order for substitution of service of a *scire facias* without a previous attempt having been made to serve it personally.]—The amount of the judgment in this case is so small, only £100, and the expense of even attempting personal service would be so great, that it would be imprudent to make the attempt.

DOHERTY, C. J.

Under those circumstances, you may take the order.

June 8.

COMYNS v. M'GRATH.

When issue was joined in Hilary Term, the Court will allow a motion for judgment, as in case of a nonsuit, to be moved in Trinity Term. An affidavit is not necessary to sustain such a motion; and the Court will refuse it on the plaintiff giving a peremptory undertaking to go to trial—directing the costs to be costs in the cause.

MR. P. BLAKE moved to enter up judgment as in case of a nonsuit, the declaration and plea having been filed, and issue joined in last Hilary Term. One clear Term had intervened; *Heath v. Boxall* (a).

Mr. *Bourke* objected that the application was premature, issue not having been joined three clear terms. Moreover, there was no affidavit

(a) 7 Dow. P. C. 19.

filed, to shew that the cause had been at issue three Terms, and that no notice of trial had been served; *Archb. Chit.* 1075.

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Common Pleas.

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M'GRATH.

DOHERTY, C. J.,

As to the first objection,* one full Term intervening is sufficient—and as to the other, the Records of the Court speak for themselves without any affidavit† to shew us the several dates. If notice of trial has been served, it would be your rebutting case, and therefore, unnecessary for them to state it.

The plaintiff having undertaken to go to trial peremptorily, the Court refused the motion, directing the costs to be costs in the cause. .

* The rule in England is, that if issue is found in a country cause in an issuable Term, judgment, as in case of a nonsuit, cannot be moved for until two Assizes have passed; *Evans v. Barnard*, 6 Dow. P. C. 367; S. C. 3 M. & W. 276.; *Williams v. Davis*, 5 Bing, N. C. 227, S. C. 7 Dow. P. C. 246. But if issue has been joined in a non-issuable Term, in a country cause, the motion may be made in the Term but one after; *Heath v. Boxall*, 7 Dow. P. C. 19. This latter case was therefore no authority for the foregoing motion, issue having been joined in an issuable Term; and the rule made is not in accordance with the English practice, unless the cause was a town cause; *Thomas v. Jones*, 7 Dow. P. C. 712.

† It appears to be the practice in England, to require affidavits to be filed on motions of this description; *Gilmore v. Melton*, 2 Dow. P. C., 632; *Brown v. Kennedy*, 2 Dow. P. C. 639; *Seabrooke v. Cave*, 2 Dow. P. C. 691.

Lessee CLOONEY v. Casual Ejector.

June 8.

MR. O'DONNELL moved to make absolute a conditional order which had been served on the tenant in possession, under the provisions of the 1. G. 4, c. 87., to give security for costs.

In proceedings under the 1 G. 4, c. 87., it is not necessary that the fact of the lease or agreement having been produced to the Court, should appear on the face of the conditional order.

Mr. James Dwyer objected, in the first place, that it did not appear on the order, that the lease under which the tenant held, had been produced to the Court at the time of obtaining the order.

The demand of possession need not have been made

DOHERTY, C. J.,

The statute requires that it should be produced to the Court before

before the expiration of the lease or interest.

The lessor having died before the expiration of the lease, on the 1st of May 1841, and letters of administration having been taken out on the 24th of the following December, and demand of possession made on the 4th of the next April. Held not to be such laches as would disentitle the party to proceeding under the 1 G. 4, c. 87. *Semble*—if the occupying tenant could shew a fair equitable claim for an extension of the lease, the Court would not make absolute the conditional order.

3 H

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that the order can be granted. As we granted the order, we shall presume that all that was necessary for the obtaining of it was regularly done; and there is no necessity for spreading it out on the face of the order.

Mr. James Dwyer.—Another objection is, that according to the words of the statute, and the decided cases of *Loveland* and *Thrustout* (a), and *Lessee Harrison v. Ejector*, cited by Baron Penefather in the case of *Lessee Lord Bandon v. Ejector* (b), the demand of possession should be made before the expiration of the lease. In this case, it was not made until after. It is true, that the Queen's Bench has ruled otherwise, *Jack dem. Spollen v. Thrustout* (c); but this Court has expressed no opinion on the subject.

DOHERTY, C. J.

The practice of the Courts ought to be conformable to each other; and as the Exchequer seem, in the case of *Lessee Lord Bandon v. Ejector*, to have adopted that of the Queen's Bench, we shall do the same.

Mr. James Dwyer.—We next object that there has been *laches* on the part of the plaintiff, which disentitles him from taking advantage of this statute, the notice not having been served for nearly a year after the expiration of the tenancy (the lease having expired on 1st of May 1841, and the notice having been served on the 4th of April last), which has had the effect of setting up a new constructive tenancy, *Doe v. Somerville* (d); *Doe dem. Thomas v. Field* (e); *Lessee Lord Bandon v. Casual Ejector*; and in *Loveland v. Thrustout*, Chief Baron O'Grady observes, that "Where the landlord has been in default, he has no right to enforce the Act against a tenant who has been in no default." But if all these objections are ruled against us, we are entitled to succeed on the merits of the case disclosed in our affidavit; for if there is an affidavit shewing that there was any thing to try, as Crampton, J., stated in *Lessee Flynn v. Ejector* (f), the rule will not be made absolute. Now, by his will, dated in November 1840, about the time of his death, the lessor directed that the lessee in this case should be dealt with in relation to the lands, as certain persons therein mentioned should direct. This gives the lessee, at all events, an equitable title to an extension of the lease; and she ought not to be removed until some award has been made by these referees.

Mr. Brewster, Q. C., *contra*, was desired to confine himself to the

(a) 1 H. & B. 354. n.

(c) 1 H. & B. 354.

(e) 2 Dow. P. C. 542.

(b) 6 Law Rec. N. S. 319.

(d) 6 B. & C. 126.

(f) Ir. Law Rep. 72.

two last objections. As to the imputed *laches*, this was the case of a personal representative, who could not take any proceeding for the recovery of the land, until letters of administration had been taken out. These bear date on the 24th of December last, and on the 4th of April the demand is made. This accounts sufficiently for the apparent delay. As for the merits, they set up a supposed equitable extension of a term, which, even if it had any foundation, could not be tried in the ejectment; but which is untenable, by reason of one of the parties, to whom the matter was referred by the testator, being the personal representative who demanded the possession.

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DOHERTY, C. J.,

We do not say, that if this were a case of a fair equitable claim, we would not interfere; but it is obviously the case of an overholding tenant, and it is impossible not to see that there is nothing to be tried. With respect to the delay, the circumstance of the title not having been consummated until within four months of the making the demand of possession, negatives *laches*. We shall therefore make absolute the conditional order without costs.

BRENNAN *v.* MONAHAN.

June 7.

MR. WHITESIDE moved for liberty to amend two pleas of the Statute of Limitations, which had been demurred to for having stated the cause of action, "*if any there be*," not to have accrued within six years; *Margetts v. Bays* (a). A consent to allow the demurrer, and that the defendant should be at liberty to amend on the usual terms of paying costs, had been served, and affidavits had been filed setting out a host of circumstances to shew that we have not a meritorious defence. But the Court will not go into these affidavits, for the principle of allowing amendments before argument is fully laid down in *Brazier v. Jones* (b), to be without reference to the circumstances of the case. Liberty to amend before argument is a matter of course; *Mackey v. Given* (c), and there is no reason why it should not be allowed in the case of a plea of the Statute of Limitations, which is not necessarily an unconscientious plea; *Maddocks v. Holmes* (d).

The Court will give a defendant liberty to amend a plea of the Statute of Limitations before argument; and will not allow the plaintiff to open affidavits detailing the special circumstances of the case, for the purpose of shewing that the defendant had not a meritorious cause of defence.

Where a party allows a special demurrer, he need not specify the amendments he seeks to make in his notice of motion.

(a) 6 N. & M. 228.

(b) 6 B. & C. 199.

(c) Al. & Nap. 397.

(d) 1 B. & P. 228.

T. T. 1842. In the foregoing case of *Margetts v. Bays*, which is similar to ours in every respect, liberty was given to amend even after argument.

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Mr. *Macdonagh* and Mr. *Moore* opposed the motion.—It is the practice of the Queen's Bench* to refuse the amendments sought, unless they are specified in the notice, which has not been done in this case.—[*Per Curiam*. There is no such rule in this Court. At the same time a notice is drawn in a slovenly manner, that does not state them.]—The plea of the Statute of Limitations is necessarily unconscientious, and the Court will shew it no favour; *Willett v. Atterton* (a); and in *Latouche v. Spence* (b), Chief Justice Carleton ruled that the Court would not allow an amendment of a plea of the Statute, unless it appears that the defendant has a meritorious cause of defence. The same principle was acted on in the case of *Graham v. Shaw* (c). On the authority of these cases, we submit that we are entitled to open the merits of this case, which we have set out in our affidavit, to shew that the defendant has no meritorious cause of defence.

DOHERTY, C. J.,

We do not lean against the Statute of Limitations, as necessarily importing, where pleaded, an absence of merits in a defence. It is not, however, on that ground that we grant the motion, and refuse to allow the parties to go into the affidavits which have been filed, but to prevent the Court being harrassed and distracted with questions of fact. We entirely concur with the propriety of the rule laid down by Lord Tenterden, in the case of *Brazier v. Jones*, which has been cited at the Bar. He says:—"Now, the rule undoubtedly is, that either party is at liberty to amend his pleadings before judgment. If we were to refuse to allow the amendment in this case, by reason of any special circumstances not connected with the record, but brought before us by affidavit, it would be difficult to avoid refusing liberty to amend in other cases, by reason of special circumstances disclosed to us by affidavit; and the consequence would be, that the Court might be called upon to inquire by affidavit into the circumstances of each particular case, in order to determine whether an amendment should be allowed or refused. I think that would produce great mischief; and upon the whole, I am of opinion, that justice will be better administered by allowing amendments of

(a) 1 Wm. Bl. 84.

(b) Ir. T. R. 155.

(c) 1 Ir. L. R. 373.

* *Sed vide Anon*, 3 Ir. Law Rep. 216, where the Queen's Bench have decided the reverse of this proposition.

"pleadings to be made on reasonable terms, without reference to circumstances not connected with the record." With that opinion, and the reasons given for it, we entirely concur; and instead of overruling it, as we are required to do by the Counsel for the plaintiff, we would adopt such a one, even if we had not the direct sanction of so high an authority as Lord Tenterden for its propriety.

T. T. 1842.
Common Pleas.
BRENNAN
v.
MONAHAN.

Let the defendant be at liberty to amend his pleas, on payment of the costs of the demurrer, and of the amendment.

WOODROFFE v. BLAKE.

COUNSEL moved for a *scire facias* to revive a judgment which was entered in the year 1816. There had been no revival or acknowledgment in writing, but it was sworn, that "several sums had been paid within the last thirteen years on foot of the interest."

June 9.
—
A *scire facias* issued to revive a judgment more than 20 years old, where it was merely sworn, that "several sums had been paid within the last thirteen years on foot of the interest."

DOHERTY, C. J.*—Take the order.

within the last thirteen years on foot of the interest."

* The Court of Queen's Bench require that the affidavit on motions to revive judgments, should specify the particulars of the payment or payments of interest relied on—the sum or sums paid—where and when, and by whom and to whom, such payment or payments were made.—Vide *Anonymous*, ante, p. 104.

PAGE v. MURPHY.

MR. SHORTT moved to set aside a declaration, with costs, for irregularity, in being entitled of Trinity Term, the writ having been returnable in Easter Term; *Barrett v. Barnard* (a).

June 9.

Mr. Macdonagh, *contra*, stated that on receiving notice of motion, the

The declaration having been irregularly entitled of a Term different from that in which the writ was returnable, the

defendant ought to have given the plaintiff notice of the irregularity, before serving him with notice of setting it aside; or to have called on him in the alternative, either to amend, or that the declaration should be set aside.

(a) F. & S. 23.

T. T. 1842.
CommonPless.

PAGE

v.

MURPHY.

plaintiff had served a notice on the defendant of being willing to amend, if he would attend at the office for that purpose ; to which he refused to accede unless on payment of costs, when none could have been incurred.

Per Curiam.

Why did not the defendant give the plaintiff notice of the error? If he had done so, this motion might then have become unnecessary. At all events, his notice of motion ought to have been in the alternative of having the declaration set aside, if not amended. It does not appear, on the authority cited, that this course was not taken, and that the motion had not, in that case, become necessary by non-compliance on the part of the plaintiff.

Let the motion be refused without costs—the plaintiff being at liberty to amend.

Lessee LEWIN v. JENNINGS.

June 9.

In an ejectment for non-payment of rent, which went down for trial at the last Assizes, but became a *remanet*, by reason of a successful challenge of the array by the defendant, the Court would not allow an amendment of the declaration by adding a demise in the name of the assignee of an insolvent lessor of the plaintiff.

Quære—

Has the Court power to order an amendment of a declaration in ejectment for non-payment of rent, after the service?

MR. WORKMAN moved to amend the first and second declarations of ejectment, by inserting an additional demise, in the name of the assignee of one of the lessors of the plaintiff, who had been discovered to have been an insolvent, on the terms of paying the costs of the amendment. It was an ejectment for non-payment of rent, and the record had gone down for trial at the last Assizes, when it became a *remanet* by reason of the defendant having put in a successful challenge to the array. Counsel cited Lessee *Russell v. Tuthill* (a), to shew that amendments were allowed in ejectments for non-payment of rent.

Mr. *Walter Bourke, contra.*—Amendments are constantly allowed in ejectments on the title, but not in ejectments for non-payment of rent, which is a statutable remedy ; and under the legislative provisions of the several Ejectment Statutes, an affidavit of the service of the ejectment is required as a necessary pre-requisite to the action. If, then, an amendment of the declaration be allowed, the affidavit of service would not shew the service of the ejectment on the record, but of a different ejectment ; and the plaintiff must, consequently, fail, or there would be error on the

(a) 2 Ir. Law Rep. 360.

record. The practice is now settled in the Exchequer, that an amendment in such an action will not be allowed; *Lessee Russell v. Thynne* (a).

T. T. 1842.
Common Pleas.

Lessee
LEWIN

v.
JENNINGS.

DOHERTY, C. J.

We must refuse this motion with costs. We wish it, however, to be distinctly understood, that we do not rest our decision on the ground of the abstract right of giving leave to amend declarations in ejectments for non-payment of rent, after the service, but on the peculiar circumstances of the case—the time of the application, and the proceedings that have taken place in it up to the present time.*

(a) 6 Law Rec. N. S. 277.

* In the case of *Lessee Barton v. Casual Ejector*, 1 C. & D. 452, this Court gave permission to amend, by altering the day of *ouster*, in an ejectment for non-payment of rent.

Executor O'BRIEN v. Heir and Tertenants of UPTON.

July 12.

MR. ROBERT FERGUSON moved to set aside an order for a *scire facias* to revive a judgment, or that the proceedings be stayed until the plaintiff should give security for costs. The judgment was entered in 1794, and the affidavit on which the order was obtained, merely stated that "all interest on foot of the judgment had been paid up to the 27th of October 1831, as by the receipt of John O'Brien (the conusee) may appear." This affidavit was insufficient in not swearing by, or to, whom the interest had been paid; *Anonymous* (a).—[DOHERTY, C. J. The reference to the receipt cures the defect (if any) in the swearing to the payment of interest.]—As to the other point, viz., the security for costs, the plaintiff resides in America, and it has been decided in this Court, on the authority of *Selby v. Crutchley* (b), that we are entitled to it in this as well as in any other action; *Assignee Archdall v. Supple* (c).

This Court will order a personal representative residing out of the jurisdiction, to give the defendants in a *scire facias* security for costs.

Mr. Kane opposed the motion, on the ground that neither the heir nor the tertenants had made an affidavit of merits, but the Attorney had merely sworn that there was a meritorious defence to the action. The plaintiff, moreover, was suing as a personal representative. Counsel cited

(a) 4 Ir. Law Rep. 104.

(b) 4 B. Moore, 280.

(c) 3 Ir. Law Rep. 287.

T. T. 1842.
Common Pleas.

O'BRIEN

v.

UPTON.

Webber v. Fitzgerald (a), in which Mr. Justice Foster, when sitting as a Baron of the Exchequer, had refused a similar application for security for costs in an action of *scire facias*.

Mr. *Ferguson*, in reply.—The circumstance of being a personal representative makes no difference, as by the late Act, 3 & 4 Vic. c. 105, s. 56, personal representatives are rendered liable for costs.

DOHERTY, C. J.

There is no distinction now between a personal representative and a party suing in their own right; we shall, therefore, grant that part of the order which asks for security for costs.

Let the proceedings be stayed on the *scire facias* until the plaintiff give security for costs, including costs of the motion.

(a) 3 Ir. Law Rep. 509.

KELLY v. ST. GEORGE.

June 6.

To obtain execution under the provisions of the 3 & 4 Vic. c. 105, s. 27, for a sum of money awarded, the party seeking it must move for an order *nisi* on the opposite party to pay it, which, on being made absolute, gives the Court jurisdiction.

MR. SAUSSE, on behalf of the plaintiff, moved for a conditional order on the defendant to pay the sum of £96, which had been awarded; or for liberty to issue execution under the 3 & 4 Vic. c. 105, s. 27. The case had been submitted to arbitration by consent, and the award had been made a rule of Court. The practice was settled in England by the case of *Jones v. Williams (a)*, that on making the conditional order absolute the Court will issue execution.

DOHERTY, C. J.

Take an order *nisi*, that the defendant pay the sum awarded.

(a) 11 Ad. & El. 178.

T. T. 1842.
Common Pleas.

DEERING v. PALMER.

June 7.

THIS was an action of trespass and false imprisonment. The defendant, who was the Sheriff of the King's County, pleaded the general issue. The cause came on for trial before the Lord Chief Justice, at the Sittings of *Nisi Prius*; and the Counsel for the plaintiff in opening her case, stated that the action had been brought for an abuse of the Sheriff's warrant, in the special bailiff's having, after the arrest, taken the plaintiff out of the direct way from the place of arrest to the county gaol; and after having left her at large on the way thither, had arrested her again out of his jurisdiction in the County of Kildare. After this statement, the plaintiff's Counsel gave in evidence to maintain the said issue, on her part, a certain notice in writing, admitted to be signed by her, and served on the defendant, bearing date the 22nd of January 1841, entitled in the cause of the *Marquis of Drogheda v. Anne Deering* (the plaintiff), in which, among other things, it was recited, that the plaintiff had been arrested by the defendant upon a writ of *ca. sa.* in the said cause. They also produced another notice of the 22nd of February 1842, entitled in the present cause, calling on the defendant to produce at the trial the warrant granted against the plaintiff, upon an execution issued against her, in the cause of the *Marquis of Drogheda v. Anne Deering*, and also, the indemnity given to the Sheriff, "upon granting the warrant on the said execution." The plaintiff's Counsel then produced the gaolor, who proved the Sheriff's warrant, which directed the bailiffs, by virtue of her Majesty's writ of *ca. sa.* to him directed, to arrest and keep in custody the plaintiff, *to satisfy* the Marquis of Drogheda a certain debt recovered against the plaintiff. They then proved the arrest and the subsequent occurrences, and closed their case. The Counsel for the defendant then addressed the Jury, and referred to the 10 *Car.* 1, sess. 2. c. 16, but called no witnesses, nor did he produce the writ on which the warrant was issued. The Counsel for the plaintiff then called on the learned Judge to direct a verdict for his client, because that the defendant had shewn no legal ground of justification, or writ, to justify the several trespasses complained of; but his Lordship refused so to direct them; and the Jury having found a verdict for the defendant, the plaintiff's Counsel took a bill of exceptions, which now came on to be argued.

In action of trespass and false imprisonment against the Sheriff, who pleaded the general issue, the plaintiff's Counsel stated the case to be an abuse in the mode of executing a writ of *ca. sa.* and gave in evidence among other things, certain notices, served by the plaintiff on the defendant, which recited, and admitted, that she had been arrested on such a writ. *Held*, that the defendant having omitted to prove the said writ, the Judge ought to have directed the Jury to find for the plaintiff.

Mr. *Hamilton Smythe*, and Mr. *Macdonagh*, in support of the exceptions.

It will be contended on the other side, that the proof of the writ was dispensed with, by reason of the plaintiff's admissions of its existence.

T. T. 1842.
Common Pleas.

DEERING

v.

PALMER.

That is not, however, a sufficient justification at common law. The general issue only puts in issue the assault, but justification must be specially pleaded; *Co. Litt.* 282, *b*. In trespass, where a defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea particular; *Co. Litt.* 283, *a*. And in 1 *Wms. Saunders*, 298, *n*. 1, where all the authorities are collected, it is further laid down, that the defendant ought to aver in his plea that he has substantially pursued such authority; *Co. Litt.* 303, *b*. In pleading a writ, you must set out the issue, return, and delivery; for if a defendant seeks to justify a trespass, he must shew the authority under which he acted, in order that the Court, who alone are Judges of the law, may decide as to its sufficiency; and also that the plaintiff may be able to ascertain its existence; *Hammond's Nisi Prius*, 100, 101. We do not actually know, at this moment, whether the writ ever issued, and have no means of knowing; for it is not the practice to return writs of execution which have been executed; and the Officers will not inform parties whether writs have issued in a cause or not. The writ may have been executed after its return, and it is not necessary to cite authority to shew that a Sheriff cannot execute a writ after its return, although he may on the return day: or the arrest may have been before the delivery of the writ to the Sheriff, which would be also illegal; *Hall v. Roche* (*a*). It is true, that since the passing of the 10 *Car.* 1, *sess.* 2, *c.* 16, it is not necessary that the Sheriff should plead justification; but he must still prove a legal justification. The statute only dispenses with the necessity of pleading, not of proof, being entitled a Statute "for Ease in Pleading." It would not have been sufficient, at common law, to shew that there was a writ, without stating the delivery, and return day; and such special matter as before the statute should have been pleaded, must now be given in evidence. Admissions are not to be taken very strong against a party, where they refer to a document in the hands of his adversary; and in this case the writ is in the hands of the Sheriff, it not being usual to return it; *Rankin v. Horner* (*b*). The writ has been either returned or it has not; if it has been returned, it is a record, and should be proved in the same manner as other records;—if the writ has not been returned, the original should be produced; *Roscoe on Evid.* 36 (ed. 1836). An admission by an insolvent that he was discharged under the Insolvent Acts, has been held not sufficient to supersede the necessity of proof; *Scott v. Clare* (*c*); and on the same principle, in this case, any admissions we may have made of the existence of a writ, did not supersede the necessity of its proof by the party justifying under it.

Mr. Pakenham, Mr. Griffith, and Mr. Berwick, Q. C.—The only

(a) 8 T. R. 187.

(b) 16 East, 191.

(c) 3 Camp. 236.

question is, whether the course of the trial dispensed with the necessity of producing the writ. If ever there was an admission of an original legal arrest, it is in this case. It has been admitted—first, by Counsel in his statement; secondly, by the documents produced by the plaintiff in evidence. The plaintiff's Counsel stated that there was an arrest under a warrant in a certain cause; and that one of the causes of action was the fact of the bailiff having taken the plaintiff out of the direct road to gaol. Now, if that were the cause of action, how can they now say that she had been taken by an indirect road? The other cause of action was, that she was arrested out of the jurisdiction, which is likewise inconsistent with the allegation of an arrest on a writ out of return. The record is, that the plaintiff having stated an issue, called witnesses to prove it; and there is no case where a party having limited an issue, can afterwards go out of it; *Tracy v. Blake* (a). Next, they have admitted the writ in the notices which they themselves have put in evidence; *Slatteri v. Pooley* (b); in which case the deed was not required to be proved. The admission of the party concerning the contents were held sufficient. Suppose that the verdict had happened to have been against us, would it not have been set aside as against evidence? and having their own admission, and the statement of their Counsel, that it was the only issue to be tried, will the Court now send it down again for trial, having the statutable power of deciding as to justice may appertain? It would be contrary to justice to give them thus a power to try a collateral issue, which it would be, as they are bound by their exceptions. In *Woodward v. Larking* (c), the recital of the writ in a bill of sale was held sufficient, without further proof.

T. T. 1842.
Common Pleas.
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v.
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DOHERTY, C. J.

June 10.

This was an action for trespass and false imprisonment. The defendant pleaded the general issue. The action was brought against a Sheriff, not for an illegal arrest, but for an abuse in the mode of executing the process; and then for the manner of treatment after arrest. It was shortly described by the plaintiff's Counsel, that the only question in controversy was, whether the authority had, or had not, been abused: first, by an arrest out of the county; and, secondly, by taking the defendant by a circuitous route to the gaol. At the conclusion of the plaintiff's case, the defendant's Counsel intimated their intention not to call any witnesses. It was then contended on the part of the plaintiff, that I ought to direct a verdict for him, on the grounds that no writ or legal justification was shewn; I refused so to direct the Jury; and on my refusal, the exception was taken,—and we are of opinion, after a full consideration of the case, that the exception

(a) 1 M. & W. 168.

(b) 6 M. & W. 664.

(c) 3 Esp. 286.

T. T. 1842.
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was well founded,—and that the defendant, as one of a class, who, availing himself of the statute for ease in pleading, not in proofs, should have proceeded to shew a legal justification. But then it is contended, that the course taken by the plaintiff dispenses with the necessity of proof, as it was an admission, waiver, or estoppel. Now, what was the conduct of the party, before the trial and before action commenced? A notice was served as if the proceeding were against a Magistrate; and in it is reference to a writ of *ca. sa.*, and the subsequent treatment as the only cause of complaint. This, it is said, amounts to an admission of the writ, and waives the necessity of producing it. We are of opinion it did not supersede the necessity; it merely referred to a writ, but did not state the existence of any particular one, nor admit that the same was not out of return. But then, it is said, that plaintiff's Counsel admitted in his opening, that only two questions were to be tried, and he has, therefore, limited himself, and superseded the necessity of proofs as to other matters. This would be a dangerous and inconvenient practice, that Counsel opening as in this case, pointing attention to what it ultimately would resolve itself into, should bind himself to that statement. An admission of matter falling within the knowledge of the defendant, merely amounts to an announcement to Court and Jury, that defendant is in a condition to shew all regular in that branch of the case; but we are of opinion that it would be very inconvenient if such a short and simple statement amounted to an admission that all was right in defendant's case, and dispensed with proof of justification. We, therefore, think that the defendant was wrong in thus stopping short, without the production of the writ, and that, consequently, the exception must be allowed, and that a *venire de novo* must issue.

Allow the exceptions, and let a *venire de novo* issue.

1841.
Exch. of Pleas.

MICHAEL FERRAR v. LAURENCE COSTELLO and wife.

(*Exchequer of Pleas.*)

Hilary Term.
Jan. 20, 25.
Mich. Term.
Nov. 3.

ASSUMPSIT.—The first count of the declaration stated, that the defendant, Isabella Costello, heretofore, and while she was the wife of Daniel Mongan, deceased, and the said Daniel Mongan, heretofore, to wit, on the 4th day of November 1833, in the county of the city of Dublin, made their promissory note in writing, and delivered the same to one Rose Ferrar, and thereby jointly and severally promised to pay the said Rose Ferrar, or order, the sum of £40, twelve months after the date thereof, which period had elapsed. That the said Rose Ferrar then and there indorsed the said note to the said plaintiff, whereof the said Isabella and the said Daniel then and there had due notice: and the said Daniel and Isabella then and there jointly and severally, promised the said plaintiff to pay him the amount of the said promissory note, according to the tenor and effect thereof, and of the said indorsement. That afterwards, and before the promise of the said defendant Isabella, thereafter next mentioned, the said Daniel Mongan died, without having paid the amount of the said promissory note, and leaving the said Isabella him surviving. And that afterwards, and before the intermarriage of the said Isabella with the said Laurence Costello, to wit, on the 1st November 1839, the amount of the said note being and remaining wholly due and unpaid, and the said defendant Isabella having full knowledge and notice of the premises, she, the said Isabella, after the death of her said husband Daniel, as aforesaid, and whilst she was sole and a widow, in consideration of the premises, then and there promised the plaintiff to pay him the amount of the said note, according to the tenor and effect of the same. The declaration contained also the money counts, stating that the defendant Isabella, afterwards, whilst she was sole and a widow, as aforesaid, to wit, on, &c., at, &c., was indebted to the plaintiff in £100 for so much money then and there paid by the plaintiff for the use of the said Isabella while she was sole and unmarried; and in £100, &c.; and concluded by averring that the said defendant Isabella afterwards, to wit, on, &c., at, &c., being then sole and a widow, as aforesaid, in consideration of the said last mentioned premises respectively, promised the said plaintiff to pay him the three last mentioned several sums of money respectively on request; yet the said defendant Isabella, whilst she was so sole and a widow, as aforesaid, and the said defendants, Laurence and Isabella, since their marriage, had not, nor had either of them, as yet paid the said several sums of money, or any of them, or any part thereof, &c.

Plea, non assumpsit.

Action against A., and B. his wife, on the joint and several promissory note of B. and a former husband. It appeared at the trial that B. was possessed of separate property at the time she signed the note, and that on an application for payment of the note during her widowhood, she admitted the debt to be a fair one, and promised to pay it. The fact of her having separate property did not appear upon the declaration, which, after stating the making of the note by B. and her first husband, and the death of the latter, averred that B., whilst a widow and sole, "in consideration of the premises," promised to pay the note; *Held*, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for B.'s promise.

H. T. 1841.

Each of Pleas.

FERRAR

v.

COSTELLO

AND WIFE.

On the trial before the Lord Chief Baron, on the 17th of November 1840, the plaintiff proved the making of the promissory note stated in the first count, by the defendant Isabella and her then husband, Daniel Mongan. A witness for the plaintiff stated that he had applied to the defendant, Isabella, while a widow, for payment of the note, and that she admitted "the debt to be a fair one, and promised to pay it when able." The plaintiff also proved the will of a Mrs. Clarke, whereby certain property therein mentioned was devised to the defendant Isabella, to her separate use. One Figgis, a trustee and executor named in the will, was then examined, and deposed that he received the proceeds of the said property, and applied them according to the trusts of the will. This witness also proved that Mrs. Clarke, the testatrix, died some time previously to the making of the promissory note in question. Counsel for the plaintiff relied on the case of *Lee v. Muggerridge* (a), as shewing that the defendant Isabella was under a moral obligation which formed a sufficient consideration for her express promise to pay the note. No witnesses were examined for the defence, but the defendants' Counsel contended that the note having been executed by a *feme covert*, was a nullity; that her subsequent promise to pay was without any consideration either legal or moral, to support it;—and that the defendant Isabella, and her present husband were, consequently, not liable in the present action. They, therefore, called on the learned Chief Baron to nonsuit the plaintiff, or to direct the Jury to find a verdict for the defendants;—this, however, his Lordship refused to do, directing the Jury to find a verdict for the plaintiff, if they believed the evidence; but reserving leave to the defendants to move to have it changed into a verdict for them, in case the Court above should be of opinion that the direction was wrong in point of law.

Mr. Holmes (with whom was Mr. Fitzgibbon) for the defendants, now moved accordingly.

First. The note having been executed by the defendant Isabella during coverture, is *quoad* her void; and if any presumption exist in this case, it is that she executed it under the coercion and by the direction of her first husband; secondly, with respect to her subsequent promise to pay the note,—it was perfectly *nudum pactum*, being unsupported by any legal or moral obligation. Her present husband cannot, consequently, be liable on the note as for a debt of his wife existing prior to the marriage. In *Lloyd v. Lee* (b), where a married woman gave a note as a *feme sole*, and after her husband's decease, in consideration of forbearance to sue, promised payment, it was held by Pratt, C. J., that the note was not barely voidable but absolutely void, and that forbearance, where originally there

(a) 5 Taunt. 36.

(b) 1 Str. 94.

was no cause of action, is no consideration to raise an assumpsit. The following cases were decided on the same principle: *Cockshott v. Bennett* (a); *Marshall v. Rutton* (b); *Lewis v. Lee* (c); *Faithorne v. Blaquiere* (d). *Lee v. Muggeridge* (e) has been relied on by the plaintiff's Counsel, as shewing the sufficiency of a moral obligation to sustain a promise; the circumstances of that case are widely different from those existing in the present. Here, there is no evidence, as there was there, of the money having been lent or procured at the request of the wife; nothing appears but the naked fact of her having joined her husband in making the note. In *Lee v. Muggeridge* (e) the wife was clearly under a moral obligation to pay the debt secured by her bond; but here there was no obligation on the defendant Isabella to pay the note, unless there be a moral obligation on every married woman to pay her husband's debts. In *Littlefield v. Shes* (f), Lord Tenderden says that the doctrine of moral obligation has been carried too far.—[BRADY, C. B. There is a still later case going a great way to overrule this doctrine of moral obligation,—*Eastwood v. Kenyon* (g)].—As to the wife having a separate estate,—that is a subject with which a Court of Law has nothing to do; it is the peculiar province of Equity to deal with a married woman's separate property; and even a Court of Equity in such a case, by its decree, acts not against the person, but upon the estate; 1 *Mad. Chan. Prac.* 599; *Francis v. Wigzell* (h). If this woman has done any thing to affect her separate estate, a Court of Equity is, therefore, the proper tribunal to be resorted to. In the note to *Wennell v. Adney* (i) most of the older cases are collected, and the law is thus laid down:—"An express promise can "only revive a precedent good consideration, which might have been "enforced at law through the medium of an implied promise, had it not "been suspended by some positive rule of law; but can give no original "cause of action, if the obligation on which it is founded never could "have been enforced at law, although not barred by any legal maxim or "statute provision." This note is quoted with approbation by Lord Denman in *Eastwood v. Kenyon* (g), as containing a correct exposition of the law.

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Mr. *Whiteside* and Mr. *Napier*, *contra*.—In point of form this motion has been misconceived; for if the facts stated in the declaration do not disclose a sufficient cause of action, the defendant ought, before verdict, to demur, or afterwards, to move in arrest of judgment;

(a) 2 T. R. 763.

(e) 3 B. & C. 291.

(e) 5 Taunt. 36.

(g) 3 P. & D. 276; S. C. 11 A. & E. 438.

(i) 3 B. & P. 249.

(b) 8 T. R. 545.

(d) 6 M. & S. 73.

(f) 2 B. & Ad. 811.

(h) 1 Mad. 238.

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Lumby v. Allday (a). In point of law, the question here is not whether the note was void or valid, for it is not sought to sue the defendant Isabella, simply on the note as revived by the promise,—but whether the verbal promise made by her was founded on a sufficient consideration. The note was a meritorious security when given, and operated as to the wife as an appointment out of her separate estate. The disability of the wife to bind herself at law, during coverture, is in favour of the husband; but there are many cases in which she is bound by the joint contract (b). It would seem to be a general principle that where a contract cannot be enforced against the contracting party on account of personal exemption or disability, the ratification of it when the disability or exemption is removed, amounts to a valid binding engagement; *Hyleing v. Hastings* (c); *Southerton v. Whitlock* (d); *Trueman v. Fenton* (e); *Cooper v. Martin* (f); *Barnes v. Hedley* (g); *Thornton v. Illingworth* (h). A Court of Law recognises equitable rights, although it has not the power to enforce them; thus, forbearance to sue in a Court of Equity constitutes a good consideration for an assumpsit at law; *Hunt v. Danvers* (i); *Thorpe v. Thorpe* (k); *Scott v. Stevens* (l).—[CHIEF BARON. What is the consideration here? The declaration first states the making of the promissory note by the defendant Isabella, jointly with her husband, and then avers that after his death, she promised to pay it; but there is neither averment nor proof that the money was paid to her.]—As every intendment is to be made in support of the verdict (m), it may be intended here that the note was given for a debt of the wife *dum sola*, and for which she and her husband would be jointly liable, and she alone as survivor (n). The note itself imports a consideration; *Philiskirk v. Pluckwell* (o). The contract of a married woman is not a nullity where the husband is present and assenting to it; *Com. dig. Baron & Feme, Q.*; *Manby v. Scott* (p); *Bowyer v. Peake* (q); *Bro. Abr. Obligation, Pl. 74*; *Northampton's case* (r). It is not upon the ground of any supposed coercion that her contract cannot be enforced during coverture, but by reason of a positive rule of law, by which husband and wife are considered as one person. But for the personal exemption arising from

(a) 1 C. & J. 303.

(b) *Vide*, 1 Rol. Abr. 349, pl. 2.

(c) 1 Ld. Raym. 389.

(d) 1 Str. 690.

(e) Cowp. 544.

(f) 4 East, 76.

(g) 2 Taunt. 184.

(h) 2 B. & C. 826.

(i) Sir T. Raym. 370; and see *Lane v. Mallory*, 1 Roll. Rep. 27.

(k) 1 Ld. Raym. 663.

(l) 1 Sid. 89.

(m) See 1 Bro. Abr. 356; *M^r Allister v. Mayne*, A. & N. 405.(n) See *Mitchinson v. Hewson*, 7 T. R. 348.

(o) 2 M. & S. 393.

(p) Bridg. 231.

(q) Freem. Ch. Rep. 215; 2 Eq. Ca. Abr. 133.

(r) 3 Leon. 72.

positive law, she would be liable; she may, therefore, ratify her contract by express promise; 10 *Byth. Con.* by *Jarman*, p. 3; *Bill v. Hyde* (a); *Moore v. Hussey* (b); 1 *Roll. Abr.* 349, pl. 2 (c); *Dyer, a.*, pl. 36; *Roley v. Crotty* (d). Here it having been proved at the trial that the wife had separate property when she signed the note, she was under a moral obligation, which was a sufficient consideration for her subsequent express promise to pay it; *Gibbs v. Merrill* (e); *Atkins v. Banwell* (f); *Lord Suffield v. Bruce* (g); *Hawkes v. Saunders* (h); *Chitty on Bills*, p. 18; *Buller's N. P.*, 129, 130, 147, 281; 1 *Vin. Abr. Assumpsit, A.*; *Lee v. Muggeridge* (i)—which was also before Sir W. Grant (k)—is expressly in point, and if that case be right in principle it must govern the present. With respect to the cases cited at the other side—*Lloyd v. Lee* (l) was decided on the pleading. The ground of the decision is thus explained by Lawrence, J., in *Barnes v. Hedley* (m)—“As the party could not previously be sued on the instrument, there “was no forbearance to sue, and, therefore, no consideration for the “promise. And the forbearance being the only consideration alleged in “the declaration, although another good consideration might exist, proof “of it would not be admissible.” The case is similarly explained in *Lee v. Muggeridge* (i); *Jones v. Ashburnham* (n); and in 2 *Saund.* 137, c., note. But the case of *Scott v. Stevens* (o), shews that *Lloyd v. Lee* (l), in any point of view does not apply when the wife has separate property. *Littlefield v. Shee* (p) was decided on the ground of variance; the goods were stated to have been supplied to the wife, though the husband was living. All that Lord Tenterden says in that case is, that the doctrine of moral obligation must be received with some limitation. In *Eastwood v. Kenyon* (q), nothing can be more inaccurate than the language of the judgment as reported. It confines the ratification of infants' contracts to those which are voidable, and refers to *Lloyd v. Lee* (l), as if deciding the broad principle as to *feme covert*s. In *Eastwood v. Kenyon* (q), the benefit was conferred *voluntarily* by the plaintiff; there was no request on the part of the defendant, either express or implied. The defendant was in no way connected with the property when the money was expended. In p. 286, Lord Denman seems to leave the question as to the

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(a) *Gilb. Eq. Ca.* 83.

(b) *Hob.* 95.

(c) And see *Goodright v. Straphan*, *Cowp.* 901.

(d) 2 *Jones*, 158; *S. P. Edmond's case*, 3 *Leon.* 164.

(e) 3 *Taunt.* 311.

(f) 2 *East*, 505.

(g) 2 *Stark. N. P. C.* 175.

(h) *Cowp.* 290.

(i) 5 *Taunt.* 36.

(k) 1 *V. & B.*

(l) 1 *Str.* 94.

(m) 2 *Taunt.* 193.

(n) 4 *East*, 461.

(o) 1 *Sid.* 89.

(p) 2 *B. & Ad.* 811.

(q) 3 *Per. & D.* 276.

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ratification by the wife open, or rather admits it as sufficient. As to the note in 3 B. & P. 250, it exactly sustains the plaintiff's case, as it is put on the ground that the party was incapacitated to bind himself by some positive rule of law; and in p. 251, the note states "the express promise operates to revive the liability and take away the exemption." The explanation of *Barber v. Fox* (a), and *Lloyd v. Lee* (b), there given, is however, quite erroneous; and the conclusion drawn from the latter case, and *Cockshott v. Bennett* (c), is at direct variance with the cases, as to infants becoming liable by express promises, where the contracts are void, *Hunter v. Agnew* (d). As to *Cockshott v. Bennett* (c), Lord Kenyon denies the distinction between a contract founded on a consideration not immoral, and on a consideration that is fraudulent; an express promise will revive the former but not the latter. The cases of *Hart v. Minors* (e), and *Beverley v. The Limerick Gas Company* (f), were also cited.

Mr. Fitzgibbon, in reply.—*Atkins v. Hill* (g) and *Hawkes v. Saunders* (h), may be considered as overruled by *Deeks v. Strutt* (i). In *Lee v. Mugeridge* (k), all the facts were minutely stated in the declaration and proved at the trial. The last paragraph of Lord Denman's judgment in *Eastwood v. Kenyon* (l) is in point and decisive. The defendant Isabella's promise was, at all events, merely conditional, being to pay "when she was able;" but the promise in such a case must be clear, express and certain; *Flemming v. Hayes* (m); *Mucklowe v. St. George* (n); *Lynbury v. Weightman* (o).

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The case was now argued a second time by Mr. Napier, for the plaintiff.

On the first argument it was contended on the part of the defendant, that the promise being to pay "when able," was only conditional; but the objection not having been taken at *Nisi Prius* is now too late; *Allen v. Baldwin* (p).

Of this opinion was the COURT.

- (a) 2 Saund. 135.
- (c) 2 T. R. 765.
- (e) 2 C. & M. 700.
- (g) Cowp. 288.
- (i) 5 T. R. 690.
- (l) 3 P. & D. 285.
- (n) 4 Taunt. 613.

- (b) 1 Str. 94.
- (d) 1 F. & S. 15.
- (f) 2 N. & P. 290.
- (h) Cowp. 289.
- (k) 5 Taunt. 96.
- (m) 1 Stark. N. C. C. 371.
- (o) 5 Esp. 198.

- (p) 1 H. & J. 224.

[Upon the other points, most of the former arguments were repeated, and the same authorities again cited.]

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PENNEFATHER, B.*—The ground of your argument is, that merely averring that this woman made and signed the promissory note, implies that it is a note binding on her—or, in other words, that there was an antecedent debt, or a separate estate of the wife. Now, I cannot accede to any such inference.

Mr. Napier.—It must be admitted the note would be a nullity unless she had separate property ;—but that fact was distinctly proved at the trial.—[PENNEFATHER, B. We cannot intend any thing as proved at the trial except what is averred in the pleading. Therefore, all we can assume as having been proved in this case is, that the defendant Isabella made the note and afterwards promised to pay it. The statement in the declaration that she made the note, is merely equivalent to saying that she *signed* it. But, a statement of the mere manual act of making or signing the instrument, does not *per se* imply that it was made for a valuable consideration. Again, the promise alleged in the declaration is in consideration of the “premises ;” what are the premises? the mere statement of the making of the note—which is not a sufficient consideration.]—The very fact of the wife being a party to the note shews that her joining in it was relied on as giving validity to the security—or why else would she be called on to join? *Lee v. Muggeridge* (a) shews that she was under a moral obligation to pay the note, and that such was a sufficient consideration to sustain her subsequent promise to do so.—[PENNEFATHER, B. But the same case shews that the moral obligation must be stated on the record. Is it enough then merely to state that a married woman joined her husband in making a promissory note? That may have been under compulsion or duress. There is no averment that the money was advanced or lent by her procurement or at her request ; on the contrary, it may have been advanced or lent to her husband.—CHIEF BARON. In *Lee v. Muggeridge* (a) it appeared from the declaration that the wife had separate property.—PENNEFATHER, B. It is, at all events, manifest that the pleader in that case did not consider the mere statement of the making of the bond as a sufficient averment of consideration.—RICHARDS, B. It is the declaration here that is defective.]—The proper course, then, was to move in arrest of judgment.

BRADY, C. B.

We are all of opinion that this declaration does not disclose a sufficient

(a) 5 Taunt. 36.

* The learned Baron was not present during the first argument.

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cause of action. With respect to the case of *Lee v. Muggerridge* (a), it is unnecessary to say more than that the present case does not come up to it on the facts and averments in the declaration.

PENNEFATHER, B.

As the plaintiff proved the facts alleged in his declaration, it is clear the Judge could not have nonsuited at the trial. The proper course, then, is to arrest the judgment (b); and with respect to the costs of the motion, we think we ought not to give them, as the party might have demurred to the declaration, and thereby terminated the action at an earlier stage and with less expense.

RICHARDS, B.

Had it been averred in the declaration that this married woman, at the time she made this promissory note, was possessed of separate property, it would have raised an important question; and had such a statement been contained in the pleading, I am far from saying that a subsequent promise would not have been sufficient to entitle the plaintiff to maintain his action; for, although a Court of Law does not directly deal with equitable property, it in many instances recognises and notices it. I am not, however, expressing an opinion upon the point, but I desire to be understood as not expressing an opinion *against* it.

Judgment arrested.

(a) 5 Taunt, 36.

(b) See acc. *Lumby v. Allday*, 1 C. & J. 301.

M. T. 1841.
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VINER *v.* BOYD and another.

Nov. 3.

MR. R. C WALKER moved to substitute service of the *capias ad respondendum* upon the defendant Boyd, who was out of the jurisdiction of the Court, by serving the other defendant, who was within the jurisdiction. The defendants were partners in trade, carrying on business in London. The contract upon which the action was brought was made personally with the plaintiff in Ireland by one of the partners. He had lately arrived in this country upon business, and was then served with a writ in this action; and also with another for his partner who was in London: but he refused to cause an appearance to be entered for him. For the application, *Murray v. Moore* (a), and the cases of actions against Insurance Companies (b), where the policy was effected in Ireland, were relied on.

In an action against partners, the Court refused to substitute service of a *ca. re.* upon one partner for another residing out of the jurisdiction; the 3 & 4 Vic. c. 105, s. 37, restricting a plea in abatement for non-joinder of a co-defendant, to cases where the latter is resident within the jurisdiction.

BRADY, C. B.*

Is such an order now necessary? By the 3 & 4 Vic. c. 105, s. 37, the plea of abatement for the non-joinder of a co-defendant, is taken away in cases where the co-defendant is resident out of the jurisdiction of the Court. The affidavit does not state any special grounds shewing the necessity for making such an order; and unless there be some very special ground for substituting the service, I would not be inclined to grant the order in cases coming within the provisions of the Act.

No rule.

(a) 1 Jo. 129.

(b) See the cases collected *Moore and Lowry's Rules*, 187, n.

* *Solus.*

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ANONYMOUS.

Nov. 9.

A notice of motion for a new trial which refers to the certificate of Counsel for the grounds of the motion is informal.

A notice of motion ought always to state the grounds upon which it is to be made.

This was a motion for a new trial. The notice of the motion stated that it would be made upon the grounds mentioned in the certificate of Counsel.

Mr. *Brewster*, Q. C., with whom was Mr. *Macdonogh*, objected to the notice as defective in form; instead of itself specifying the grounds of the motion, it refers for them to another document. A notice has been held bad which contained a similar reference to an affidavit (a).

Mr. *Keatings*, Q. C., *contra*, insisted on the sufficiency of the notice.

Per Curiam.

The form of the notice is certainly most objectionable, inasmuch as it imposes upon the Officer, the perplexing task of seeking for the grounds of the motion in the certificate of Counsel. We are not aware, however, that we have ever refused to hear a new trial motion, by reason of a defect of this description in the notice; but it is unquestionably an ingredient not to be lost sight of when we come to the consideration of the costs.

The case was heard.

(a) See acc. *Gordon v. Breaky*, 6 Law Rec. 2nd ser. 269; and see *Lessee Lynch v. Casual Ejector*, 2 Ir. Law Rep. 240.

Executors of MIDDLETON v. SADLER.

Nov. 22.

This Court will not upon motion pronounce an order for payment of the costs of attending to oppose a notice of bail in error which proves ineffectual from the non-attendance of

the plaintiff in error to perfect his recognizance.

MR. HOBART, for the plaintiffs, moved that the defendant do pay to the plaintiffs the costs incurred by them by reason of a notice to give bail in error, served on them by the defendant. On the 7th of July 1841, the plaintiffs obtained judgment upon argument of a demurrer. Immediately afterwards the defendant sued out a writ of error; and on the same day, (the 7th of July), he served the plaintiff with notice that he would, on the 29th of July, attend before Baron Pennefather, one of the Judges of

Assize, at the town of Clonmel, and would then enter into security by recognizance (a). On the 28th of July the Attorney for the plaintiffs left Dublin for Clonmel, to oppose the bail. On the 29th, 30th and 31st he attended at the Court-house at Clonmel; but the defendant not appearing to perfect bail, he was on the 31st discharged from further attendance on the Court. Another notice was served on him that the defendant would enter into the requisite security at Nenagh. He did not, however, do so. Execution had been sued out, and the debt had been levied by the Sheriff. It was sworn that the writ of error was sued out solely for the purpose of delay; and that it could not be prosecuted, as it was sued out against one of the executors only. The plaintiffs had incurred costs in opposing the bail.

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Mr. Rolleston, for the defendant.

PENNEFATHER, B.

Is there any case in which an order has been pronounced for the payment of the costs of an ineffectual notice of bail? The only way in which such costs can be got is when the party comes to perfect bail; and then the bail will not be received unless upon the terms of his paying the costs of the former notice.

BRADY, C. B.

The party may still go on with the writ of error: it is still pending. These are costs incurred in the Court of Error, and I do not see how we can interfere with respect to them. I also am of opinion, that this case is exactly similar to the case of a defendant giving an ineffectual notice of bail to the action. There, the plaintiff can only get the costs of the first notice as a condition upon which the defendant will be allowed to perfect bail.

No rule.

(a) *Vide*, 1 G. 4, c. 87, s. 8.

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Nov. 22.

Practice as to
 payment of
 money into
 Court.

MALLETS *v.* DOOLAN.

MR. STEPHENS, for the plaintiff, moved to set aside a side-bar rule of Court, obtained by the defendant for liberty to lodge the sum of £31 in full of the plaintiffs' demand; inasmuch as the defendant did not thereby undertake to pay the plaintiffs' costs, pursuant to the 34th Rule of Easter Term 1834. The action was brought to recover the amount of three bills of exchange. Before the declaration was filed, the defendant paid the amount of one of them into Court in full satisfaction of the plaintiffs' demand. The sum so paid into Court was less than the amount endorsed on the copy of the writ as the sum due for debt.

Mr. *Hutton, contra.*—If the sum were paid into Court after declaration filed, the practice is governed by the 34th General Rule of 1834, and the defendant should undertake for the costs; but where it is paid into Court before declaration filed, the practice is to pay it into Court in full discharge of the action. If he were not enabled to do so, he would, in all cases where he contested the amount of the debt, be obliged to incur the expense of a declaration. At all events, this is but an irregularity, which has been waived; for the plaintiff applied for a consent that he should be at liberty to draw out the money lodged, which the defendant gave in the terms of the rule, viz., that he should accept it in discharge of his action; and the declaration has been since filed, and notice of it given, to the defendant. The costs incurred are marked on the back of the writ; and, therefore, there can be no difficulty in ascertaining what is lodged for debt, and what for costs. *Yeo. & Billing's Ex. Prac.* 168, was cited.

Mr. *Stephens*, in reply.—The origin of the rule for lodging money in Court is stated in 1 *How. Ex. Pr.* 133, and from that it appears that if the defendant tendered the debt after the commencement of the action, it was pleadable in bar of the further prosecution of the suit; and, therefore, the defendant was liable for the costs already incurred. *Stewart* in his treatise, says that the new rule has altered the old practice.

BRADY, C. B.

It is reported to us by the Officer that before the rules of 1832, this practice prevailed,—that the defendant, before declaration filed, might obtain a rule to lodge money in Court in full for debt and costs. If the plaintiff were willing to take it out accordingly, the action was discontinued; if he did not, the money remained in Court as an indemnity to

the defendant for the costs of the action. If the plaintiff succeeded, the Taxing Officer ascertained the rights of the parties; for he taxed the costs down to the time of the lodgment, and thereby ascertained the amount for which, at that time, the defendant was liable for costs: and if the plaintiff recovered no more than the difference between that sum and the sum lodged, the defendant was entitled to the costs of the action; if he recovered more, the execution went for the difference. The new rule, in terms, contemplates the case of a lodgment after declaration filed; and it is reported to us, that from the time the new rule has come into operation, it has been considered by the Officers of the Court to apply only to lodgments made after declaration filed; and that when the lodgment is made before declaration is filed, it is made according to the ancient practice. This subject, of lodgment of money in Court, is at present under the consideration of the Judges, for the purpose of framing an amendment of the 34th General Rule; and the difficulty in the present case will probably be cleared up by that amendment. But on the present motion, we must declare that the lodgment has been made according to the ancient practice of the Court, and, therefore, no rule on the motion.

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It is, of course, unnecessary to enter into the discussion of the subject, as the matter is under the consideration of the Judges; and the rule to be framed will probably remove all ambiguity on the subject*.

No rule.

* A new General Rule has been since promulgated, for which see *Moore & Lowry's Rules*, p. 283.

M. T. 1841.
Each. of Pleas.

Nov. 3, 23,
 and 25.

HUDSON, assignee of HENRY, a bankrupt, v. M'ALLEN.

Where the goods of a trader were seized by the Sheriff under an execution issued upon a judgment obtained by confession on a warrant of Attorney; and after the seizure but before the sale, the trader committed an act of bankruptcy.—*Held, (RICHARDS, B. dissentiente),* that trover lay at the suit of the assignee for the recovery of the value of the goods against the execution creditor, to whom the Sheriff had paid over the proceeds of the sale without notice of the bankruptcy.

THIS was an action of trover brought by the plaintiff as the assignee of John Henry, a bankrupt, to recover the value of certain goods which had been sold by the Sheriff of Armagh, under an execution issued at the suit of the defendant, upon a judgment by confession obtained against Henry on a warrant of Attorney. The case was tried before Mr. Justice Torrens at the Armagh Spring Assizes for the year 1841, when it appeared that Henry, who was by trade a printer, had committed an act of bankruptcy on Monday the 30th of December 1839, by leaving his usual place of residence in the city of Armagh about ten o'clock at night, with the view of avoiding his creditors. It further appeared that about seven or eight o'clock on the same evening, the goods in question, which belonged to the bankrupt, had been seized by the Sheriff under the execution at the suit of the defendant. The sale took place on Wednesday the 1st of January 1840, and the amount of the execution was subsequently paid over by the Sheriff to the defendant M'Allen, the plaintiff in the execution; but there was no evidence to shew that at the time the proceeds of the sale were so handed over, either the Sheriff or the execution creditor had notice of the bankruptcy. A commission of bankruptcy was afterwards issued against Henry, and the plaintiff duly appointed his assignee. No witnesses were produced on the part of the defendant, but his Counsel contended that inasmuch as it appeared that the goods of the bankrupt had been seized by the Sheriff under the execution at the defendant's suit previous to the act of bankruptcy, such seizure was lawful, and, therefore, that the plaintiff had not sufficient title to the goods sold under the execution, to enable him to maintain an action of trover for their value; they further contended that the plaintiff had misconceived his action, and that instead of trover, it ought to have been an action of assumpsit for money had and received. The learned Judge overruled the objection, giving it as his opinion that the action was maintainable in point of law, and told the Jury that if upon the evidence they believed that Henry had departed from his residence on the night in question with the intent of defeating or delaying his creditors, they should find a verdict for the plaintiff. His Lordship, however, reserved the objection taken by the defendant's Counsel for the consideration of the Court above. Verdict for the plaintiff.

On the 26th of April, pursuant to the leave reserved, a conditional order had been obtained to set aside the verdict, which it was now sought to make absolute.

Mr. *Holmes*, and Mr. *Tomb*, in support of the order.—The question turns upon the construction of the 126th section of the Irish Bankrupt Act, 6 *W.* 4, c. 14.* The first clause of that section contains an exception; and the proviso in the conclusion is an exception out of an exception. It must be admitted that the defendant's case falls within the proviso; and the only question is, whether the assignee can maintain trover for the goods sold by the Sheriff, neither the Sheriff nor the execution creditor having had notice of the bankruptcy before the sale. As the act of bankruptcy was subsequent to the seizure, although prior to the sale, the seizure was lawful, and the defendant cannot be considered a *tort-feaser*, or held liable in trover, which is an action founded on a *tort*; if any action lies, it is *assumpsit* for money had and received. In *Wymer v. Kemble* (a), the plaintiff was held not to be "a creditor having security for his debt;" and Lord Tenterden there says—"The seizure and sale were perfect and complete before the act of bankruptcy." So in *Wiggins v. M'Adam* (b) it was held that a plaintiff in execution upon a judgment by confession ceases to be a creditor having security for his debt within the 6 *G.* 4, c. 16, s. 108, when the goods seized under that execution are sold, even although an act of bankruptcy be committed before the return of the writ. The 126th section of the Irish Act does not render the execution in all cases void, but merely enacts that the plaintiff in such execution shall share rateably with the other creditors; *Taylor v. Taylor* (c). The Sheriff was bound to sell in compliance with the exigency of the writ, the execution having been legally laid on. *Noiley v. Buck* (d) shews that the proper form of action is *assumpsit* for money had and received.—[PENNEFATHER, B. That case certainly establishes the right of the assignee to bring an action for money had and received, but is there any thing in it that negatives his right to maintain trover?—Lord Tenterden entertained considerable doubts whether any action at all was sustainable. *Moreland v. Pellatt* (e)

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(a) 6 B. & C. 479.

(b) 8 Y. & J. 1.

(c) 5 B. & C. 392; S. C. 8 D. & R. 159.

(d) 8 B. & C. 160; S. C. 2 Man. & R. 68.

(e) 8 B. & C. 722.

* The 126th section enacts—"That no creditor having security for his debt, or having made any attachment in Dublin, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, although for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

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was also an action for money had and received. After the produce of the sale has been paid over by the Sheriff to the execution creditor without notice of the bankruptcy, it would be a measure of injustice and hardship to hold either of them accountable in trover for the full value of the goods. If the Sheriff and the execution creditor were not trespassers or wrong-doers at the time of the sale, what has since made them so? or when did they first become so? In *Woodland v. Fuller* (a) trover was brought by the assignees of an insolvent against execution creditors. The assignee took possession of the insolvent's property under a vesting order, and afterwards the Sheriff seized it under a writ lodged with him before the vesting order was made; and it was held that the seizure was proper,—Patteson, J., observing, "That the general property is in the plaintiffs, and they had possession under it; but the Sheriff was not a wrong-doer when he seized in right of the execution creditor; and, therefore, trover could not be maintained."

Mr. Gilmore, Q. C., and Mr. Napier (with whom was Mr. Whiteside), *contra*.

It would tend "to the prejudice of the bankrupt's other fair creditors" if in a case like this, trover were not maintainable, and the assignee were confined to an action for money had and received against the execution creditor at whose suit the goods were sold. Upon a Sheriff's sale, goods are always sold to disadvantage, and it would be a strong inducement to the execution creditor to hurry the sale in all cases where insolvency was apprehended, were he thereby to incur no greater responsibility than that of being obliged to refund the proceeds of the sale; while on the other hand, a salutary check would in such cases be interposed, were the plaintiff in the execution to be made liable for the full value of the goods, irrespective of the price for which they may have been sold by the Sheriff. First, considering the question on principle—the Sheriff, it is true, is justified in seizing, because the property is then the bankrupt's; but by the act of bankruptcy, the property is changed, and the right of the Sheriff to retain is at an end; the goods become the property of the assignee, and a sale of what belongs to the assignee is clearly a conversion. In the next place, considering the case upon the authorities;—the law at one time fluctuated, but it is now settled that the Sheriff, who sells goods after an act of bankruptcy by the owner, is liable in trover; and if so, can it be said that the execution creditor who puts the Sheriff in motion and who adopts his act, is not to be equally liable? In *Stead v. Gascoyne* (b) the seizure was valid, and yet the Sheriff was held liable in trover for the subsequent sale. The bankruptcy is a statutable *superseas* of the execution. The defendants contend that he is not liable in

(a) 11 A. & E. 859.

(b) 8 Taunt. 527.

trover, but only in assumpsit for money had and received. But if notice be necessary to enable the plaintiff to maintain trover in this case, it would be equally necessary to enable him to maintain an action for money had and received. Both actions are founded upon the same principle, viz., that the property in the goods was at the time of the sale by the Sheriff vested in the plaintiff; *Kitchen v. Campbell* (a). They must, therefore, say that the defendant is not liable at all. The judgment having been entered upon a warrant of attorney, comes within the proviso at the end of the 126th section; and is, therefore, out of the exception in that section; and, therefore, the case falls within the general rule in bankruptcy, viz., that the property vests in the assignees from the date of the bankruptcy; *Baker v. Pettigrew* (b); *Wymer v. Kemble* (c).—[BRADY, C. B. May it not be a question whether you can lay a conversion before the act of bankruptcy?]—Holroyd, J., appears to have been of opinion that you can; *Taylor v. Taylor* (d). *Notley v. Buck* (e), is in principle the same as this case. There the trader committed an act of bankruptcy after seizure and before sale. The Sheriff had notice of it before sale, and yet sold; and held that he was liable in an action for money had and received. Now, notice is immaterial in an action for money had and received, therefore, that case is a decision that notice is not necessary in actions of trover: for both actions are founded on the same principles. So in *Groves v. Cowham* (f) it was held that the Sheriff was liable in trover for goods seized by him after the commencement of the imprisonment, but before the assignment of the insolvent's property to the assignee, and sold afterwards with notice of the assignment: and Tindal, C. J., says—"I can scarcely conceive the case of an action for money had and received by means of a tortious conversion of goods, in which on the same principle an action of trover would not equally lie." Now, here it is admitted that the assignees might sue for money had and received; and, therefore, in trover. Even in *Balme v. Hutton* (g), in which it was held that the Sheriff was not liable in trover for goods seized by him after an act of bankruptcy of which he had not notice, Lord Lyndhurst, in delivering the judgment of the Court, held that the creditor would in such a case be liable in trover, pp. 23, 24. *Balme v. Hutton* was afterwards reversed on writ of error to the Exchequer Chamber (h). And in *Garland v. Carlisle* (i), the House of Lords settled the question by deciding that the Sheriff who seizes and sells after an act of bankruptcy, is liable in trover although he has not notice. That case furnishes a

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(a) 3 Wils. 307.

(b) 2 Ir. Eq. Rep. 151.

(c) 6 B. & C. 479.

(d) 5 B. & C. 392, 394.

(e) 8 B. & C. 160.

(f) 10 Bing. 5; S. C. 3 M. & S. 352.

(g) 2 C. & J. 19.

(h) 1 C. & M. 262.

(i) 4 Bing. N. C. 7; S. C. 4 M. & Sc. 24; 11 Bligh, 421.

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complete answer to the alleged hardship arising from the want of notice. Whose was the property at the time of the sale?—[PENNEFATHER, B. That is the point in this case.]—The property was not altered by the seizure.—[BRADY, C. B. The assignees by relation, acquire the property from the act of bankruptcy, but as between the party whose goods are seized and the party seizing them, is not the property changed by the seizure?]—No, *Giles v. Grover* (a) shews that the property is not altered by the seizure. So also in *Baker v. Pettigrew* (b), per Sir Michael O'Loughlen, M. R., "By the seizure under a writ of *fiery facias*, the "Sheriff acquires a special property in the goods, leaving the general "property still remaining in the defendant."

Mr. S. B. Miller, for the defendant, in reply.—Here the seizure was lawful; and the sale took place and the money was paid over before notice of the act of bankruptcy. *Groves v. Cowham* is distinguishable; for there the seizure was after the committal to prison; and the title of the assignee related back to that period. *Cooper v. Chitty* (c), which is the leading case, is also distinguishable; for there the seizure was after the act of bankruptcy. In that case, Lord Mansfield says—"Although the statutes concerning bankrupts rescind all contracts and "executions, not completed before the act of bankruptcy, and vest the "property in the assignees by relation, in order to an equal division of his "estate among his creditors, yet they do not make men trespassers or "criminal by relation, who have innocently received goods from him or "executed legal process, not knowing of the act of bankruptcy. That "was not necessary, and would have been unjust."—[PENNEFATHER, B. That can hardly be considered as law, after the decision of the House of Lords.]—*Taylor v. Taylor* (d) shews that the execution is not void;—that the bankruptcy is not a *supersedeas* of the execution. Now the 126th section of the Bankrupt Act only says, that "No creditor, although "for valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself "of such execution to the prejudice of other fair creditors, but shall be "paid rateably with such creditors:" and that provision will be amply satisfied by holding him liable for the proceeds of the sale merely. The meaning of the clause is, that the execution creditor shall not retain the proceeds of the sale, but that it shall be divided rateably amongst the creditors.—[PENNEFATHER, B. No; but that he shall not avail himself of the execution to the prejudice of the other fair creditors; which would be the case if the goods were sold at an under value. The creditor appears to me to be liable on this principle. If the creditor desire the Sheriff to

(a) 2 M. & Sc. 311.

(b) 2 Ir. Eq. Rep. 151.

(c) 1 Eurr. 20.

(d) 5 B. & C. 392.

seize goods, he is a trespasser if he cannot justify. He attempts to justify by reason of the writ; but the Act says that he shall not avail himself of the writ. It follows, therefore, that he is liable in trover. Holroyd, J., says, that he must come in with the other creditors: that can only be by allowing the assignees to recover the full value of the property. The true construction of the section is, that a creditor by virtue of a judgment on a warrant of attorney, shall no longer be considered as an execution creditor, within the first part of the exception; he shall derive no benefit from his execution; he shall be in the situation of a general creditor merely.]—Then as to the effect of the seizure by the Sheriff, *Giles v. Grover* (a), and *Woodland v. Fuller* (b), shew that the Sheriff having lawfully seized, is bound to sell. This question must now be decided for the first time. In *Wymer v. Kemble* (c), and *Morland v. Pellatt* (d), the act of bankruptcy was subsequent to the sale. In *Garland v. Carlisle* (e), *Balme v. Hutton* (f), the act of bankruptcy was prior to the seizure, and in *Notley v. Buck* (g) there was distinct notice of the act of bankruptcy before the sale.

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RICHARDS, B.

(After stating the facts of the case, his Lordship proceeded as follows):—Unquestionably it has been established, although not without some opposition, but upon principles that appear to me perfectly intelligible, that when an act of bankruptcy has been committed before the issuing of the execution, the Sheriff who seizes and sells the goods that did belong to the debtor before the bankruptcy, as well as the plaintiff in the execution, who puts the Sheriff in motion and takes benefit from such sale, are each of them liable to be sued in trover by the assignee of the bankrupt, for the goods so seized. There are many cases, but I think it sufficient to refer to *Balme v. Hutton* (h). This law, however, it must be admitted, is a hard law, and oftentimes presses severely, if not unjustly, upon the public Officer and *bonâ fide* creditor. But, as long as the Sheriff is bound by law to seize and sell the goods of the defendant in the execution and none other (and I do not see how the law could be otherwise than it is in that respect), so long, I apprehend, must the responsibility of the Sheriff and execution creditor continue to the extent I have stated. The necessity of the case and undoubted principles of law require that it should. But in the present case, it is insisted, that a still more severe and stringent rule of law should be meted out to the

(a) 1 Cl. & Fin. 77.

(c) 6 B. & C. 479.

(e) 10 Bing. 452.

(g) 8 B. & C. 160.

(b) 11 A. & E. 859.

(d) 8 B. & C. 722.

(f) 2 C. & J. 20.

(h) 9 Bing. 471.

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Sheriff and to the execution creditor. It is said and argued, that although no act of bankruptcy had been committed by the debtor at any time previous to the issuing of the execution against him, or prior to the seizure of his goods by the Sheriff, that nevertheless, and although the goods which the Sheriff seized were in fact and in law the goods of the defendant at the time of the seizure, and although it is not alleged, or shewn in any way that the Sheriff or execution creditor had any notice of any act of bankruptcy committed by the debtor subsequent to the seizure under the execution, or been cautioned against selling his goods by any one, that nevertheless the Sheriff and the execution creditor, in the absence of any demand on them or claim by any other party, are guilty of a *tort* in selling the debtors' goods, and of a wilful conversion of those goods which, it is admitted, had been rightfully seized, upon the ground that the debtor had committed a secret act of bankruptcy after the seizure, of which they (the Sheriff and execution creditor) knew nothing. The question is not whether the proceeds of the sale should not be paid over to the assignee to be distributed rateably amongst the creditors of the bankrupt, for that, I apprehend, is not disputed, and, in my opinion, may be come at in another way ; but whether the execution creditor, who rightfully sued out his writ of *fiery facias*, and rightfully delivered same to the Sheriff, by whom the goods were legally and rightfully seized, is, as well in this case as where the act of bankruptcy has been committed before the execution delivered, to be made a *tort-feaser* by relation ; and that upon the ground that he has not taken notice of a secret act of bankruptcy of which he had no knowledge, and because he has omitted to be active in withdrawing his execution from the Sheriff upon the commission of such secret act of bankruptcy : and this brings me to the Act of Parliament upon which the question in this case turns, viz., the 6 W. 4, c. 14, s. 126. (His Lordship here read the section.)

Now, I must say, that in my opinion these words in the proviso may be well satisfied without giving them the harsh, and, I would say, unjust construction contended for. The proviso in the section does not say that the execution is to be void and of none effect from the commission of an act of bankruptcy after the delivery to the Sheriff, or declare that no sale shall take place under it, or that the duty of the Sheriff to sell under it shall cease, or any thing tantamount to that—at least, in my opinion. Now, in the Insolvent Debtors' Act in England, 7 G. 4, c. 51, s. 34, the language is much more express and emphatic, although there, the fact that was to render the creditor incapable of availing himself of his execution was one of a public nature, viz., the arrest and confinement in gaol of the debtor, and such as any execution creditor or Sheriff might be reasonably supposed to know, or to have the means of becoming acquainted with. The words in that Act of Parliament are these:—" In all cases where any prisoner, who shall petition the said Court for relief

“under this Act, shall have executed any warrant of Attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained, or to be obtained, upon such warrant of Attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of Attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under this Act.” And no doubt, it has been held upon that statute, that the arrest and imprisonment of the debtor after seizure and before sale, followed by his subsequent discharge under the Insolvent Act, entitled the assignee to proceed in trover against the execution creditor; *Groves v. Cowham* (a), and the cases there referred to. And I am free to admit that these cases touch the present question very nearly, and certainly have pressed me much; however, they do not appear, upon the best consideration I can give them, to govern the present case. The language of the Act of Parliament, upon which these decisions turned, appears to me to be different in some essential particulars from the statute upon which the present question is to be decided, as I think I have shewn. And, in the case of *Groves v. Cowham* (a), the circumstance that notice was given of the insolvency of the debtor, and a caution against selling under the execution was proved, and relied on by the Court in giving judgment, as an important and material circumstance in the case; although, no doubt, in another case an action of trover appears to have been held to be maintainable by the Court of Common Pleas in a case that came before that Court on a question of pleading, and in which no averment of notice of insolvency to the execution creditor appears to have been made in the pleadings,—I allude to the case of *Keely v. Minter* (b). In that case the action, which was trover, was brought by the assignee of the insolvent against the execution creditor. I find, however, Chief Justice Tindal, in giving judgment and speaking of *Notley v. Buck* (c), upon which I shall presently remark, says:—“There was an express averment in the replication that the Sheriff had notice of the act of bankruptcy before he proceeded to a sale: he was, therefore, clearly a wrong-doer.” Now, if it be necessary to make the Sheriff “clearly a wrong-doer,” that he shall have notice of the bankruptcy or insolvency, where the same occurs subsequent to the issuing of the execution, I confess I am at a loss to understand why the execution creditor, whose act is anterior to any thing the Sheriff does, and who is less likely to

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(a) 10 Bing. 5.

(b) 1 Scott, 620.

(c) 8 B. & C. 167.

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know any thing about the subsequent imprisonment of his debtor, should not be entitled to a like notice or demand of the goods before he can be made a wrong-doer; and I find no case, unless *Keely v. Minter* be one, that takes a distinction between the execution creditor and Sheriff, upon the section of the statute now under consideration, or upon any analogous statute.

Having thus discussed the class of cases that are founded on the Insolvent Debtors' Act and Bankrupt Act, where the act of bankruptcy occurs previously to the issuing of the execution and to the seizure of the goods of the debtor, the only other cases cited, which I think it necessary to notice are, first, *Wymer v. Kemble* (a). That was an action of trover by the execution creditor against the assignee of the debtor, and in which the execution creditor recovered. The case, I take it, merely decides that a creditor who issues an execution, under which the debtor's goods are delivered to him by the Sheriff on a bill of sale, is not a creditor having security for his debt according to the 108th section of the 6 G. 4, c. 16,—and no doubt he is not, he having been paid. But it is relied upon that Baron Bayley there states that the proviso in the analogous section in that English statute “fastens upon and limits the exception,” and to the extent of preventing the Sheriff or execution creditor from withholding from the assignee of the bankrupt the proceeds of the sale; no doubt it does limit the exception, but it is another thing whether, without any kind of previous notice of such act of bankruptcy, or demand of the goods, it operates not merely to discharge the Sheriff from the performance of his duty under the execution, but divests and takes out of him *eo instanti* the special property which he has in the goods: Baron Bayley, however, in discussing the same case with Counsel, in the course of the argument says—“Your argument goes to the extent that the assignees may “at any period, even after the lapse of ten years, recover money levied “under a judgment by confession;” to which proposition the learned Baron does not certainly appear himself to assent. The next case to which I would refer is *Moreland v. Dickens* (b); that case was an action of assumpsit brought by the assignees of a bankrupt against an execution creditor for money had and received by him from the Sheriff under an execution founded upon a warrant of attorney; but in truth it was in principle similar to *Wymer v. Kemble* (a); the Court holding that when the Sheriff receives from the debtor the amount of the execution before an act of bankruptcy committed, the execution creditor is not a creditor having security for his debt at the time of the bankruptcy, and accordingly the execution creditor had judgment in that case also. *Nolley v. Buck* (c) is the next case that I think it necessary to notice; that was an action for money had and received brought against the Sheriff, who,

(a) 6 Barn. & Cress. 479.

(b) 8 Barn. & Cress. 732.

(c) 8 Barn. & Cress. 160.

although he had seized before the bankruptcy, had subsequently to the act of bankruptcy sold the debtor's goods under execution, and paid over the proceeds to the execution creditor. In that case the Court declined expressing any opinion as to whether the sale by the Sheriff was right or not, and merely held that the proceeds of the sale belonged to the assignee. Lord Tenterden expresses himself thus—pp. 164 and 165—

“The intention, that a creditor under such circumstances shall not have the full benefit of his execution, but only be paid *pari passu* with other creditors is sufficiently manifest; the difficulty is as to the mode of giving effect to this intention, no mode being mentioned in the Act; and upon consideration, it appears to us that the only effectual mode is to prevent the creditor from receiving the money produced by a sale of the goods taken in execution.” And, again, he says:—“The seizure being prior to the act of bankruptcy will be lawful and right; it is not necessary to say whether the sale be lawful or tortious; the sale may be a lawful act, and yet the proceeds may belong to the assignees, or, if it be wrongful, they may waive the wrong and sue for the proceeds as money received for their use.”

The case of *Giles v. Grover* (a), cited also by the plaintiff's Counsel, decides that when goods have been seized under a *feri facias*, but remain unsold in the hands of the Sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *feri facias*, but delivered to the Sheriff before the sale; and shall satisfy the Crown's debt without regard to the previous execution; the House of Lords holding that in a case so circumstanced, the execution could not be considered as completed by the seizure; and the same principle will be found, I apprehend, applicable to other cases and cannot now be questioned. But I am not aware that any of the principles to be deduced from that case need be impugned in deciding the present: that case in no way conflicts with the position that the Sheriff who seized goods under an execution, has a special property in such goods, liable to be divested, no doubt; but having rightfully seized them, as in this case, and having such special property in them by virtue of such seizure, the difficulty is to understand how he or the plaintiff in the execution can be said to have *wilfully converted* such goods, because the debtor may subsequently have committed some secret act of bankruptcy. I apprehend that in many cases the right of property will not alone be sufficient to entitle a party to sustain trover against a person in possession. In *Jones v. Frost* (b) it was held that a demand was necessary to sustain trover, although the property in that case (certain bills of exchange) clearly belonged to the assignees in point of law. It is, as I take it, a mistake and quite against the authorities, to suppose that a general property in goods will in every case, without more, entitle

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(a) 1 Clerk & Fin. 72.

(b) 9 Barn. & Cress. 764.

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a party to bring trover. To make a party guilty of a tort in a case circumstanced as the present, when the seizure was originally lawful, I take it that a wilful conversion should be shewn, and that for such a purpose it would be necessary to shew a demand and refusal of the goods, or at least clear notice of plaintiff's rights; and that such demand should be made, or notice shewn, at a period when the defendant had it in his power to deliver or refuse such goods; not a demand after a sale had without notice of a title acquired by relation by the assignees, as in the present case. And now, having looked as carefully as I could through all the cases that have been cited, I do not apprehend that any of them decide the very point that we have at present before us; and being strongly impressed with the mischief that would arise from the construction of this Act contended for by the plaintiff, and the injustice that such an interpretation of the Act would work to public Officers, and to innocent persons; and neither the words nor spirit of the Act, in my opinion, calling for any such interpretation, but rather excluding it, I confess, notwithstanding that my learned Brothers entertain a different opinion, I feel bound to express my own, and to state that, in my opinion, this action of trover cannot be sustained. I take it that the Sheriff, rightfully seizing under a *feri facias*, the proper goods of the debtor, and having no notice of any transfer either by the act of the party, or subsequent secret act of bankruptcy, that could confer on any third person an interest in such goods, may sell the goods that he so seized, it being his duty in execution of the writ so to do, for which there is abundance of authority; but that having sold the goods, he must in law be considered as holding the proceeds for whoever may be justly entitled thereto; and that he, or the execution creditor, if he delivers the proceeds of the sale to him, may be sued for the same in an action for money had and received by the assignees.

PENNEFATHER, B.

My Brother Richards has stated the facts of this case with great clearness; but I am bound to say, that the view I take of it differs from that which has presented itself to his mind. No decision exactly on the point, it would appear, has been made, but the cases cited bear on the principle and seem to me to require the construction which, independently of those cases, I should feel myself bound to put upon this Act of Parliament. It must be remembered, that the question here arises on the Bankrupt law, the object and policy of which is to give equality to all the creditors; and we ought to take care that no creditor shall have a preference, unless he shall bring himself within the express provisions of the Act. The 126th section of the 6 & 7 W. 4, c. 14, on which the question mainly depends, provides that no creditor of a bankrupt shall be entitled to a preference, except he has issued execution, and has actually had the goods

of the bankrupt seized; and then the proviso at the close of the section takes out of the benefit of the exception the creditor who has obtained his judgment by virtue of a warrant of attorney. I think, therefore, that such a creditor is to be considered as one who has not the security for his debt—of an execution executed by seizure; he has not such an execution as falls within the exception, it is taken out of it by the proviso; and the property in the goods not being altered by mere seizure, upon the act of bankruptcy it vests in the assignees; and upon that act the hands of the creditor, and of those he may have set in action, are to be considered as tied, and they cannot go on to alter the property by a sale. On the corresponding enactment in England, it has been decided that the assignee may recover in an action for money had and received, the price of goods sold under circumstances similar to those existing in the present case; that decision establishes the abstract right of the assignees against the execution creditor, and there is not to be found in the case any expression which intimates on the part of the Court a doubt, as to the right of maintaining an action of trover. Again, it has been held on the English Insolvent Act (the 7 G. 4, c. 57), that trover can be maintained against the execution creditor. The words of that clause, it is true, somewhat differ from those of the section before us, but not in my mind in a way to require a different construction. The proviso in the 126th section of 6 & 7 W. 4, is in the following words:—"Provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." The effect of that proviso is, in my mind, as I have already said, to take out of and exclude from the benefit of the previous exception, a creditor by judgment or confession, as if (so far as regards him) the exception had never been made; otherwise, he might avail himself of it to the prejudice of the other creditors. The object of the Act is, that such a creditor shall derive no benefit from his judgment, and shall do no injury to the rest of the creditors. But this object would be attained in a very imperfect degree, were we to hold that he should only refund the proceeds of the sale; for, during all the time he was permitted to retain them, he would be deriving a benefit from his execution, or availing himself of it to the prejudice of the other fair creditors. So also, if the goods were sold at an undervalue, or at an inadequate price, not being answerable to the assignees for their real value, he would thereby derive a benefit from such execution, to the prejudice of the other creditors, and thus avail himself of his execution. Were it not for the doubts entertained by my Brother Richards, I confess I should not have any very great difficulty upon the subject. Bearing in mind that the object of the Act of Parliament was to effect equality,—I would say that that object could only

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be attained by our holding the creditor by judgment on confession who so intermeddles with the goods of the bankrupt, responsible not merely for the proceeds of the sale, but for the actual value of the goods sold. In coming to this decision, I have not thrown out of my consideration that sometimes an injury may be worked; and there may have been much weight in the argument, that the Sheriff who seizes the goods of the debtor should be protected against a secret act of bankruptcy. This consideration for a length of time caused the Courts to hesitate to decide that a Sheriff should be liable in trover for seizing the goods of a trader after a secret act of bankruptcy. But at length, on the principle that the goods were the property of the assignees, and not the goods of the bankrupt, the House of Lords have held the Sheriff liable in trover for the amount. The present is a case of no greater hardship, the property in the goods is not altered by seizure without sale, and upon the act of bankruptcy taking place, the right of the assignees is consummate, the creditor cannot avail himself of this execution to defeat or impair it.

It, therefore, appears to me that, consistently with the true construction of this Act, the rights of the parties cannot be adjusted if we do not hold that the act of bankruptcy stays the hands of all parties; that the Sheriff cannot, after that, proceed to sell the goods, and that the execution creditor who has set him in motion, if he do not in time countermand the authority he has given him, must be answerable for the consequences; and I think it is not enough to hold that he shall pay over the money, or the proceeds of the sale at a future day, and be paid rateably with the other creditors. He is to be paid rateably with them no doubt, but he is not to be allowed to avail himself of this security to his own advantage, or their detriment. I am, therefore, of opinion, that an action of trover is maintainable in the present case. My Brother Foster, who is unable to attend in his place, by reason of a recent domestic affliction, has authorised me to say, that he concurs in this opinion, although he at first entertained considerable doubt.

BRADY, C. B.

I also am of opinion that this form of action is maintainable under the circumstances of this case. After the clear and convincing exposition of the statute just pronounced by my Brother Pennefather, it might be enough for me briefly to express my concurrence in his views and in the conclusion he has arrived at; but I owe that deference and respect to the opinion of my Brother Richards, which renders it necessary for me to state more at length than I otherwise would have done, the reasons which have induced me to arrive at that conclusion. I will not enter upon any lengthened discussion as to the analogy between the section of the Irish Bankrupt Act, 6 W. 4, c. 14, upon which this question has arisen, and the nearly corresponding enactment of the English Insolvent Acts. The

bearing of these sections has been satisfactorily explained by Baron Pennefather, and I cannot observe any sound distinction between them. The principle of both and the language of both is nearly identical,—and I think that the meaning of the words “no creditor shall avail himself,” in the Irish Bankrupt Act, so far from being shewn to be defective by the terms of the section of the English Insolvent Act, 7 G. 4, c. 57, s. 34, is rather explained and expounded by that section, shewing what the Legislature meant by saying the creditor shall not avail himself of his execution, viz., that he shall not avail himself of it either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that such person to whom any sum of money shall be due in respect of any such warrant of attorney, shall and may be a creditor for the same under that Act. Now, on this section of the Insolvent Act, it has been distinctly decided that trover lies against the Sheriff who, after notice of the insolvency, proceeds to sell the goods seized before the insolvency. It has been further decided that trover lies against an execution creditor whose execution is laid on before the commencement of the insolvent’s imprisonment, but under which the goods are subsequently sold; *Kelcey v. Minter* (a), a case which has been mentioned by Baron Richards, but was not cited in the argument. In that case, it appears, that the question of notice was not made the ground of the decision. The whole facts are spread upon the record; there was no averment that notice had been given to the execution creditor; and it was there held, as I have said, that trover would lie at the suit of the assignee of an insolvent against the execution creditor, when the execution had been laid on before the imprisonment, and the sale of the goods seized had taken place afterwards. C. J. Tindal there says:—“In *Notley v. Buck* (b) “there was an express averment in the replication, that the Sheriff had “notice of the act of bankruptcy before he proceeded to a sale: he was, “therefore, clearly a wrong-doer. It is true that nothing is said in that “case as to the liability of the execution creditor to an action—it was not “necessary; the Court were only dealing with the Sheriff. But, upon “general principles, I hold it to be clear, that, where one puts another in “motion, the former is responsible for all the illegal acts of the latter that “necessarily result from his employment.” Let us then consider the principles which govern the case of the Sheriff, as to whom it is now settled that without notice he is liable in trover for the seizure and sale of a bankrupt’s goods seized and sold after an act of bankruptcy committed. That decision rests upon this, that by the subsequent issuing of the commission, and the appointment of assignees, the property is transferred from the bankrupt to the assignees; and that as the property vests in the

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(a) 1 Seqt, 616.

(b) 8 B. & Cr. 160; 2 M. & Ryl. 68.

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assignees by relation, it follows, that the execution is laid not upon the goods of the bankrupt, but upon those of the assignees, and that the Sheriff is therefore selling the goods of the assignees and not those of the bankrupt. That being so—is not the question here, whose goods did the Sheriff sell at the time the sale took place under the execution in this cause? At the time the goods were seized, they were the goods of the bankrupt; the Sheriff, by seizure, acquired a special property in them, but the general property in them remained in the bankrupt. If the goods remained *in specie* unsold, and an act of bankruptcy was committed, would it be contended that the property was in the Sheriff and not in the assignees? It is the duty of the assignees to make the fund available for the benefit of the creditors—for that purpose they must take all the bankrupt's property and right of property. If, then, the goods were not sold but still remained *in specie*, could it, I again ask, be contended that the assignees had not a right to them? To hold that they had not, would be to enable the judgment creditor directly to avail himself of his execution to the prejudice of the other creditors. Again, suppose a seizure of leasehold property—for instance, of a house, the property of the trader, and that the assignees wished to use it for a time for the benefit of the creditors generally—for instance, for the care and sale of other property of the bankrupt therein, is the execution creditor to deny their right to do so, and assert that he had an absolute right forthwith to make sale of it against their consent? So, I apprehend, that if the goods in this case had remained *in specie*, no question would have arisen as to their being the property of the assignees.

The question then resolves itself into this single point: Whose were the goods *at the time of the sale*? And I think it impossible to contend that they were not the goods of the assignees. The decision in the case of *Groves v. Cowhan* (a), where it was held that trover lay against the Sheriff, is put upon these grounds. Thus, in *Whitforth v. Clifton* (b), Baron Parke, in reference to that case observes, “There, the sale, “which was the act of conversion, was after the change of property: “the goods therefore were not liable to the sale.” On these grounds, therefore, I am of opinion (and were it not for the contrary opinion expressed by my Brother Richards, I should say, clearly of opinion), that these goods, at the time of the sale, had by operation of the statute become the property of the assignees; and that the judgment creditor having gotten the proceeds of the sale, must be responsible for the consequences. The result of this decision is not to make any of these parties trespassers by relation or otherwise. Trespass is an action founded on tort, and damages may be given much more than commensurate with the actual damage occasioned by the trespass; but trover is an action of

(a) 10 Bing. 5.

(b) 1 M. & Rob. 534.

a different description, it is an action for the *value* of the goods, and the value of the goods is the measure of the damages. I am, therefore, of opinion, that the motion for a new trial must be refused (a).

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Cause shewn against the conditional order to set aside the verdict, allowed, without costs.

(a) See *Whitmore v. Robertson*, 8 Mees & Wels. 463; and *Crosthwaite v. Kerrigan*, 1 Hudb. & Br. 120.

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Nov. 16, 28.

ASSUMPSIT.—The first count of the declaration stated, that before the making of the promises and undertakings of the defendants herein after next mentioned, the plaintiffs, to wit, on the 24th day of March 1837, to wit, at Dublin, in the county of the city of Dublin, at the special instance and request of one Joseph Denis Mullen, and one General Luscombe, sold and delivered to the said Joseph Denis Mullen and the said General Luscombe, divers goods, wares, and merchandizes, to wit, divers large quantities of gas of the said plaintiffs, of great value, to wit, of the value of £32, and which said gas had been, and was then and there, and at the request aforesaid, supplied to a certain hotel, to wit, Home's Hotel, in the city of Dublin, whereof the said defendant afterwards, to wit, on the 28th of April 1837, had notice, to wit, at Dublin aforesaid, in the county of the city aforesaid. That the said Joseph Denis Mullen and the said General Luscombe, and the said plaintiffs, then and there accounted together of and concerning the said gas so sold and delivered and supplied as aforesaid; and upon such accounting, the said Joseph Denis

The mere promise of a third person to pay the debt of another at a future time, does not *per se* import a contract of forbearance.

Declaration in assumpsit stating that the plaintiffs at the request of A. and B. had supplied gas to H.'s hotel, to the value of £32; that A. and B. had accounted with the plaintiffs of and concerning the gas so supplied, and upon such account-

ing were found to be indebted to the plaintiffs in £32, to be paid on request; that the defendant was the receiver of the hotel, and of the monies and profits arising therein for the use of A. and B.; and in consideration that plaintiffs, at the request of defendant, would forbear and give time to A. and B. for the payment of the said sum of money for the space of six months, he the defendant, by a certain note or memorandum in writing, signed by him, as the receiver of the hotel, and with the sanction of A. and B., promised the plaintiffs (*inter alia*), to pay them the £32 within the space of six months. Averment that plaintiffs forbore and gave time to A. and B. until the expiration of the six months, but that defendant did not perform his promise. Plea, that the promise of defendant was a promise to answer for the debt of other persons, viz., A. and B., and contained in the said note in writing in the declaration mentioned, and in the words and figures following:—"I hereby undertake as the receiver of H.'s Hotel, and with the sanction of A. and B., that the sum of £32 due to the H. Gas Light Company" (the plaintiffs) "for gas supplied to the above concern, shall be paid within six months from the date hereof; and I also undertake that the future supply of gas to the above concern shall be discharged by me as it may become due, until you have further notice." *Held*, on demurrer, that a consideration of forbearance to sue sufficiently appeared on the face of the instrument, to support the declaration.

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Mullen and the said General Luscombe were then and there found to be in arrear and indebted to the said plaintiffs in the said sum of £32, to be paid by the said Joseph Denis Mullen and the said General Luscombe to the plaintiffs when they should be thereunto afterwards requested; whereof the said defendant then and there had notice. That the said defendant was then and there the receiver of the said Home's Hotel, and the receiver of the monies and profits arising in the said hotel to and for the use of the said Joseph Denis Mullen and said General Luscombe, and thereupon afterwards, to wit, on the 28th of April 1837, at Dublin, in the county of the city, aforesaid, in consideration thereof, and also in consideration that the said plaintiffs, at the special instance and request of the said defendant, would forbear and give time to the said Joseph Denis Mullen and General Luscombe for the payment of the said sum of money, until and for the space of six months from the 28th of April 1837, to wit, until the 28th day of October 1837, he, the said defendant, by a certain note or memorandum in writing, signed by him, the said defendant, as receiver of Home's Hotel, and with the sanction of the said General Luscombe and the said Joseph Denis Mullen, undertook and then and there faithfully promised the said plaintiffs, amongst other things, to pay them, the said plaintiffs, the said sum of £32 within the space of six months from the said 28th of April 1837. Averment, that the said defendant then and there continued such receiver of Home's Hotel, and of the said Joseph Denis Mullen and General Luscombe for and during the space of six months, then next following the said 28th of April 1837; and as such receiver did then and there receive from and out of the said Home's Hotel divers large sums of money, amounting in the whole to a sum greater than the said sum of £32. The plaintiffs further averred, that they confiding in the said promise and undertaking of the said defendant so made as aforesaid, did forbear and give time to the said Joseph Denis Mullen and the said General Luscombe, for the payment of the said sum of money, for and during and until the full term and expiration of the said six months, to wit, until the said 28th day of October 1837, to wit, at Dublin, &c.; but that the said Joseph Denis Mullen and the said General Luscombe, although they were afterwards, to wit, on the 28th day of October 1837, to wit, at Dublin aforesaid, &c., requested by the said plaintiffs so to do, had not, nor had either of them, as yet paid the said sum of money, or any part thereof, to the said plaintiffs, but had hitherto wholly neglected and refused so to do, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice; and thereby and according to the tenor and effect of his said promise and undertaking, he, the said defendant, became liable to pay to the said plaintiffs the said sum of money on the said 28th day of October 1837, to wit, at Dublin, &c.; but the said defendant had not paid the same, or any part thereof, to the plaintiffs.

The second count differed only from the first in averring that Mullen was the sole debtor; and the third was the same as the second, with the exception of stating Luscombe to be the debtor.

The fourth count stated that the said plaintiffs, theretofore, to wit, on the 24th day of March 1837, to wit, at Dublin, &c., at the special instance and request of one General Luscombe, and one Joseph Denis Mullen, had sold and delivered to the said Joseph Denis Mullen and said General Luscombe, divers goods, to wit, divers large quantities of gas of the said plaintiffs, of great value, to wit, of the value of £32, and which said gas had been, and then was then and there supplied to a certain concern, to wit, a certain hotel, to wit, Home's Hotel on Usher's-quay, in the city of Dublin, whereof the said Joseph Denis Mullen and the said General Luscombe were proprietors; whereof the said defendant afterwards, to wit, on the 28th of April 1837, had notice, to wit, at Dublin, &c. That the said Joseph Denis Mullen and the said General Luscombe and the said plaintiffs, then and there accounted together of and concerning the said gas so sold and delivered and supplied, and upon such accounting the said Joseph Denis Mullen and the said General Luscombe were then and there found to be in arrear and indebted to the said plaintiffs in the sum of £32, to be paid by the said Joseph Denis Mullen and the said General Luscombe to the plaintiffs, when they should be thereunto afterwards requested; whereof the said defendant then and there had notice. That the said defendant was then and there the receiver of the said hotel and the receiver of the monies and profits to be received in the same to and for the use of the said Joseph Denis Mullen and General Luscombe; and thereupon afterwards, to wit, on the said 28th of April 1837, to wit, at Dublin, &c., in consideration thereof, and also in consideration that the said plaintiffs, at the special instance and request of the said defendant, would forbear and give time to the said Joseph Denis Mullen and General Luscombe for the payment of the said sum of money until the said 28th day of October 1837; and also in consideration that the plaintiffs, at the special instance and request of the said defendant, would supply gas to the said hotel, he, the said defendant, by a certain note or memorandum in writing, signed by him, the said defendant, as the receiver of Home's Hotel, Usher's-quay, and with the sanction of the said General Luscombe and the said Joseph Denis Mullen, undertook, and then and there faithfully promised the said plaintiffs, that the said sum of £32 due to the plaintiff for gas supplied to the above concern, to wit, Home's Hotel, and due on the 24th of March, then last, should be paid within the space of six months from the said 28th of April 1837; and that the future supply of gas to the above concern, meaning the said hotel, should be discharged by the defendant as the same should become due, until the said plaintiffs should receive further notice. Averment—that the said defendant then and there continued such receiver of Home's Hotel, and of the said Joseph

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Denis Mullen and General Luscombe, for and during the space of six months then next following the said 28th of April 1837; and that the said defendant then and there continued such receiver of Home's Hotel and of the said Joseph Denis Mullen and General Luscombe until the 29th of June 1838; and as such receiver did then and there receive from and out of said Home's Hotel divers large sums of money amounting in the whole to a sum greater than the said sum of £32, and the sum or price of gas supplied to the said hotel after the said 28th of April 1837. Further averment—that the plaintiffs confiding in the said promise and undertaking of the said defendant, so made as aforesaid, did forbear and give time to the said Joseph Denis Mullen and the said General Luscombe for the payment of the said sum of money until the 28th day of October 1837, to wit, at Dublin, &c.; and that the said plaintiffs did from and after the said 28th of April 1837, to wit, at Dublin, &c., supply gas to the said hotel, to wit, divers large quantities of gas, to wit, the amount in value of £200, without having received any further notice; and that the said defendant continued such receiver for and during the time wherein such supply of gas was made and given as last aforesaid; but that the said General Luscombe and Joseph Denis Mullen, although they were afterwards, to wit, on the 28th day of October 1837, to wit, at Dublin, &c., requested by the said plaintiffs so to do, had not as yet paid the said sum of £32 above mentioned, or any part thereof, but had hitherto wholly neglected and refused so to do, whereof the said defendant afterwards, to wit, on the day and year last aforesaid there had notice; and thereby, according to the tenor and effect of the said promise and undertaking, he, the said defendant, became liable to pay to the said plaintiffs the said sum of £32, on the said 28th day of October 1837, to wit, at Dublin, &c.; but that the said sum of £32 was not paid within the said space of six months, or at all, by the said defendant, or any other person; nor was the said future supply of gas to the above concern discharged by the defendant as it became due, or at all; nor did the said defendant ever pay the said plaintiffs for the gas supplied by the plaintiffs to the said hotel after the said 28th day of April 1837; but that on the contrary thereof a large sum, to wit, the sum of £43. 9s. 5d., became and was, and still was, due to the said plaintiffs for gas supplied to the said hotel from and after the said 28th of April 1837, whereof the said defendant, afterwards to wit, on the 25th day of June 1839, to wit, at Dublin, &c., had notice; and thereby and according to the tenor and effect of his said promise and undertaking, he, the said defendant, became liable to pay the plaintiffs the said several sums of money, to wit, at Dublin, &c.

The fifth and sixth counts were the same as the fourth, except that the former averred Mullen, and the latter Luscombe to be the debtor.

The declaration also contained the common counts for goods sold and delivered, &c., and the money counts.

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First plea to the first, second, and third counts—*actio non*, because the defendant “saith, that the said several promises and undertakings of him, “the said defendant, therein in that behalf alleged respectively, were and “are special promises and undertakings, and each of them was and is a “special promise and undertaking to answer for the debt of certain other “persons, to wit, the said General Luscombe and Joseph Denis Mullen, “and not for the debt of him, the said defendant; and contained in the “said note in writing in the said first, second, and third counts respectively in that behalf mentioned, bearing date a certain day and year, “to wit, the 28th day of April, in the year of our Lord 1837, and in “the words and figures following, and not otherwise (that is to say):— “‘I hereby undertake, as the receiver of Home’s Hotel, Usher’s-quay, “‘and with the sanction of General Luscombe and Joseph Denis Mullen, “‘Esq., that the sum of £32 due to the Hibernian Gas Light Company “‘for gas supplied to the above concern, shall be paid, within six months “‘from the date hereof; and I also undertake that the future supply of “‘gas to the above concern shall be discharged by me as it may become “‘due, until you* have further notice.’”—Verification.

To the fourth, fifth, and sixth counts there was a similar plea, and to the residue of the declaration, *non assumpsit*.

To the first and second pleas the plaintiffs demurred generally, joining issue on the plea of *non assumpsit*. The defendant joined in demurrer.

Mr. *Macdonagh*, for the demurrer.—The first set of counts treats the promise as to the arrears, as a distinct engagement, and the question upon this branch of the case is this: Whether a consideration to support that promise is expressed upon the instrument, or can be collected from the whole tenor of the writing. The second class of counts avoids the objection of variance, and includes the past and future supply. The more convenient course, at least in the first instance, will be to argue the case as if the self-same question was involved in the consideration of these counts: for although it is quite clear, that the promise to pay for the subsequent supply, is an original and not a collateral undertaking, yet, as it may be said, that the declaration states the contract as entire, it will facilitate the argument to shew, that no part of it is void. It is now settled law, that it is sufficient if the consideration can be gathered from the whole tenor of the writing, and it is not necessary, that it should be stated on the face of it in express terms, 1 *Wms. Saunders*, 211, *note c*. In *Mason v. Pritchard* (a) it is said—“These instruments are

(a) 12 East, 227.

* The guarantee was addressed to the Clerk or Manager of the Company.

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"to be taken as strongly against the party giving the guarantee as the sense of them will admit of." In *Newbury v. Armstrong* (a), C. J. Tindal says—"The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication."—(He translates the instrument, in order to imply a consideration, and adds:—"We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an Attorney in the most common intercourse of life." The case of *Emmett v. Kearns* (b) illustrates the extent to which the Courts have gone, in order to shew a consideration deducible. Now, what is the situation of the parties here? Who are the parties to this instrument? The defendant signs as receiver; he does so with the sanction of his principals, as a person in possession of their property. The Hibernian Gas Company are all parties or privies to the arrangement. An arrangement retrospective and prospective is entered into: the past arrear is stated, and its amount is ascertained: a fund is allocated for the payment of such past arrear, and a provision is made so as to insure punctual payment of each future debt as it arose. Is not the contract for forbearance naturally to be implied from an instrument worded as this is? It is not a mere absolute or abstract undertaking of a party to pay the debt of another; but the relation of the parties is indicated by the document, and every one of the circumstances stated therein demonstrates the true nature of this contract—a contract for forbearance. The defendant was in receipt of the profits of the hotel; these profits were arising *de die in diem*; and the time is measured within which the fund would liquidate the debt. Forbearance is necessarily involved in the mode of payment arranged—and arranged by whom? first, by the owners of the fund whence the payment was made: it was arranged by them, for the defendant makes the arrangement as their agent, and with their sanction;—secondly, by the defendant himself;—thirdly, by the creditors, who, in the very body of the document, state and settle an account with their debtors. It is material to observe that the creditors make arrangements for the present supply necessary for the working of the hotel, which hotel was to yield them payment of their debt, by furnishing to the defendant the means of fulfilling his undertaking, So that here we have in this single paper an account stated—a fund pointed out—the defendant in possession of that fund—a provision made as ancillary to the productiveness of that fund, and a time limited within which the payment is to be made. Surely, it is to be collected from all these things, that a suspension of the plaintiffs' demand, a forbearance by the creditor during these six months, was contemplated. This document clearly shews that it was not

(a) 6 Bing 202.

(b) 7 Scott, 687.

a promise moving voluntarily from one person to another, but was an agreement resulting from the concurrence of the minds of both. It is upon this distinction *Wain v. Warlters* (a), and *Jenkins v. Reynolds* (b), were decided. It was the technical import of the word "agreement," as contra-distinguished from "promise" which led to these determinations, as stated in the elaborate note to *Morris v. Stacey* (c). That agreement must disclose the ground of the promise, the reason wherefore it was made, and the consideration which induced it; but are they not apparent or easily and certainly collectable here? It is conceded that the mere naked promise of a surety to pay at a future time, does not necessarily imply that the consideration for so doing was forbearance towards the principal debtor in the meantime. That admission spares the necessity of reference on the other side to that class of cases of which *James v. Williams* (d) may be considered as illustrative; but even in that case Patteson, J., puts it—"Can it be collected, not as matter of conjecture, that forbearance by the creditor during the time was contemplated?" If it could be so collected, he admits the plaintiffs' case established. Then, another large class of cases is got rid of where the pleader put the wrong interpretation on the construction of the document. These cases went on variance, and not absence of consideration. The third class of cases which appear adverse to the present plaintiffs, but in reality are not so, are those where various interpretations might be put upon the language, and several considerations conjectured. This case is wholly different: nothing can be more defined than the several parts of this agreement. Their object appears to have been, a suspension of the claim until the hotel should have realised the amount: and the engagement of the surety is founded, in and takes its character from, that contract for forbearance. *Raikes v. Todd* (e) is a case, which, on principle, strongly sustains the plaintiffs' case. That case is valuable for two reasons; first, as shewing the extent to which this doctrine of "fair implication" is carried; for not only Alderson, B., at the trial, but the Judges afterwards, held that the word "secure" raised an implication that there should be a forbearance, whence it might be inferred, that forbearance formed part of the consideration; secondly, it shews the pleading here to have been rightly framed; for the consideration of forbearance, as well as the future supply, are put on the present record. If the declaration in *Raikes v. Todd* (e) had been rightly framed, the Court would have upheld the guarantee. *Wood v. Benson* (f) was lower in the scale; for in that case no implication could at all arise as to the arrears. In that case it was held, that the plaintiff could recover for the gas subsequently supplied: the case being an original order by the

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(a) 5 East, 10.

(c) 1 Holt. 167; S. C. 6 Moore, 101.

(e) 8 Ad. & Ellis, 847.

(b) 3 B. & B. 14.

(d) 5 B. & Ad. 1109.

(f) 2 Cr. & J. 95.

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defendant, and a promise to pay; but that the other portion was a collateral undertaking, and a mere naked promise without consideration. Now, in *Raikes v. Todd*, there was only the difference of the word "secure" whence an implication of forbearance could be raised. That these observations are well founded upon the case of *Raikes v. Todd* appears from the arguments and judgments in the case of *Haigh v. Brooks* (a). It may be important to refer to a dictum of Alderson's, B., p. 333, of that case: in commenting on the case of *Boehm v. Campbell* (b), he says—"The undertaking related to a debt already due; and the consideration of forbearance might be inferred from that fact." *Russell v. Mosely* (c) also applies, as the following guarantee was there held sufficient: "I hereby guarantee the present account of Miss Harriet Mosely due to R. T. Shortridge and Co., South Shields, of £112. 4s. 4d., and what she may contract from this date to the 30th September next;" and this decision was pronounced by the same Judges who had affirmed *Wain v. Warlters* (d), in the case of *Jenkins v. Reynolds* (e). Finally, assuming this to be a collateral and not a direct engagement, then what does it amount to? in the words of Parke, B., in *Andrews v. Smith* (f), it may be regarded as analogous to a prospective assignment of a particular fund, with an attornment, so to speak, of the defendant to the assignment. In such a state of things, forbearance is necessarily to be implied. The case has been argued hitherto as though this was a collateral engagement in every respect, and not a *quasi* original undertaking; it is right, however, to suggest, that this case may possibly be deemed altogether independent of the Statute of Frauds. The case of *Andrews v. Smith* (g) is an authority to that extent. In that case it was held, that a promise by a person faithfully to apply the funds of a debtor, which shall come to his hands, in satisfaction of a creditor's debt, was not within the statute; (*Chit. on Contracts*, 512, last ed.,)—in p. 631 (h), Lord Abinger says—"If the defendant contracted not to pay Hill's debt out of his own funds, but only faithfully to apply Hill's funds for that purpose, when they should come to his hands, that contract would not be within the operation of the statute." And in p. 632, Parke, B., says—"I am of the same opinion: this is nothing more than a prospective assignment of funds which were to come to the defendant's hands for Hill, and an attornment, as it were, by the defendant to that assignment; and the authorities shew that in such case, the contract is not within the statute." On this ground also, the plaintiff is entitled to judgment. This contract may be regarded as consisting of two branches, with a consideration of

(a) 10 Ad. & El. 317.

(c) 6 Moo. 521.

(e) 6 Moore, 89.

(g) 2 Cr. M. & R. 627.

(b) 3 Moo. 15.

(d) 5 East, 10.

(f) 2 Cr. M. & R. 631.

(h) 2 Cr. M. & R.

forbearance attached to the one, and a condition of future supply necessarily included in the other. The second class of counts pursues this view, and *Raikes v. Todd* (a) proves that the pleader ought to appropriate the several considerations to the branches of the contract to which they are applicable. *Wood v. Benson* (b) proves that the promise as to the future supply is an original order; and *Andrews v. Smith* (c) goes far to shew that this entire contract may be regarded as a *quasi* original undertaking. That case is used, however—coupled with the cases of *Haigh v. Brooks* (d), *Newbery v. Armstrong* (e), and *Emmett v. Kearns* (f)—as explanatory of the view submitted to the Court in reference to the consideration of forbearance, and the facility of implying it from the circumstances of the case, and the relation of the parties; and upon the entire case, it is submitted, that whether this contract be regarded as a collateral promise, or as a *quasi* original engagement, the plea furnishes no answer to the action, and this demurrer ought to be allowed.

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Mr. T. MacDermott and Mr. Napier, *contra*.—The pleas are a sufficient answer to the declaration. The guarantee is divisible, and as contended for on the part of the plaintiffs, contains two distinct and separate engagements; but that distinction is not taken in the declaration. The first class of counts applies itself to the first branch of the guarantee; the second class treats it as one entire contract. The argument on the other side is, that because time is mentioned in the guarantee, a consideration of forbearance is to be implied. But, no consideration appears on the face of this document, which is utterly devoid of every quality essential to constitute a binding agreement within the Statute of Frauds. It is an essential requisite of an agreement that it should express mutuality; the consideration is what the Statute of Frauds (g) calls the agreement; and it must be stated in the writing or guarantee; *Wain v. Warlters* (h); *Jenkins v. Reynolds* (i); *James v. Williams* (k). In the last case, the undertaking was to pay within six months, and the argument was that it implied a forbearance to sue; but the agreement was held void. In *Clancy v. Pigott* (l), the plea was precisely similar to the pleas in this case. *Morley v. Boothby* (m) was also a case like this; and in both cases, the guarantees were held void. More is required than a mere promise; and the consideration must appear not vaguely, or even as a matter of fair probability, but as a matter of moral certainty, so that

(a) 8 Ad. & El. 846.

(c) 2 C. M. & R. 627.

(e) 6 Bing. 201.

(g) 7 W. 3, c. 12, Jr.

(i) 6 Moore, 86.

(l) 4 N. & M. 496.

(b) 2 Cr. & J. 94.

(d) 10 A. & E. 317.

(f) 7 Scott, 787.

(h) 5 East, 10.

(k) 3 N. & M. 196.

(m) 3 Bing. 107; S. C. 10 Moore, 395.

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a person of ordinary capacity could at once collect it from the instrument. The principle is so laid down in *James v. Williams* (a). After referring to *Cole v. Dyer* (b), Patteson, J., says:—"This case shews that you must be "able to fix upon the consideration on the face of the instrument, not as a "matter of doubt, but as a matter of undoubted certainty." To the same effect is *Hawes v. Armstrong* (c). So in *Bewley v. Whiteford* (d), C. B. Joy says:—"The consideration must clearly appear from the guarantee "itself; either by express statement, or necessary implication. If "there be a doubt whether the consideration is executed or executory, "and that must be explained by parol evidence, the guarantee is in- "sufficient." The pleader here was so doubtful about the true meaning of the guarantee, that in different sets of counts he suggests different considerations; but where from a written agreement "two distinct con- "siderations may with equal probability be inferred as the inducement "for the engagement, the writing is not taken out of the Statute of "Frauds," *per* Lord Lyndhurst, C. B., in *Cole v. Dyer* (b). The con- sideration having been severed in the pleading,—that alleged for the promise in the first set of counts is forbearance to sue; but, in the second set of counts a twofold consideration is stated—forbearance for the past, and an engagement for a future supply. The first set of counts is bad, as it cannot be inferred that forbearance to sue was the sole consideration for the defendant's promise. Upon this part of the case, *Raikes v. Todd* (e), which was cited for the plaintiff, is an authority directly against him: Patteson, J., there says:—"If the guarantee were merely for future "advances, then such future advances might be considered as the con- "sideration for the guarantee; but that does not apply to a guarantee "comprehending also past advances. All these cases are difficult to "determine: the Court is obliged to look closely at the instrument, and "is not at liberty to form conjectures." To the same effect are the observations of Williams and Patteson, J. J., in the same case. In that case the word "secure" was relied on, but no such word occurs in the document now under discussion. The second set of counts is also bad, for where the declaration states the entire consideration, including what is void as well as what is valid, the authorities are express that the pleading is bad; *Charter v. Beckett* (f); *Lexington v. Clarke* (g); *Thomas v. Williams* (h); *Wood v. Benson* (i). If the contract be not divisible, the first set of counts is bad; if, on the other hand, it be divisible, the second set is bad. A more natural construction of the guarantee, and one more

(a) 3 N. & M. 196; S. C. 5 B. & Ad. 1109.

(b) 1 C. & J. 461.

(c) 1 Bing. N. C. 766.

(d) Hayes, 364.

(e) 8 A. & E. 857.

(f) 7 T. R. 201.

(g) 2 Ventr. 223.

(h) 10 B. & C. 664.

(i) 2 C. & J. 94.

consonant to its language may be suggested, than either of those given to it by the pleader in this case. It may reasonably be assumed that a certain percentage upon the profits of the hotel was payable to the receiver, and the defendant proposed to the proprietors that they should appoint him the receiver; and in consideration of their conferring a benefit upon him, he undertook, by the present memorandum, to be responsible for the supply of gas. If that be the true construction of the agreement, the promise is original and not collateral. *Andrews v. Smith* (a), however, does not apply, the declaration treating the promise as collateral. It must be admitted that guarantees are to be taken most strongly against the parties giving them; but according to *Green v. Creswell* (b), the true test whether a case comes within the statute or not, is that laid down in 1 *Wms. Saunders*, 211, c., viz., the fact of the original party remaining liable, coupled with the absence of liability on the part of the defendant, except such as arises from his promise. The very circumstance of this document admitting of such a variety of interpretations, sufficiently indicates the ambiguity of its language. It is probable the plaintiffs might succeed on that portion of the agreement which relates to the future supply of gas, but that is not the consideration which has been stated by the pleader; *Bentham v. Cooper* (c). *Russell v. Mosely* (d) has been misquoted; there, the only consideration stated being the future supply of goods, and the verdict having been entered on the third count.

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Mr. *Macdonagh*, in reply.—*Bewley v. Whiteford* (e) must be considered as overruled by *Haigh v. Brooks* (f), in which it was expressly decided by the Court of Error than an ambiguity in the guarantee might be explained by parol evidence.

BRADY, C. B.

The question is, whether on the face of this instrument as stated in the declaration, there is shewn consideration, such as is averred by the plaintiffs for the defendant's promise? and I am of opinion that such consideration is sufficiently stated. The consideration alleged, is the forbearance by the Hibernian Gas Company to sue—and their agreement to give time for the payment of the debt due to them. There are two undertakings included in the guarantee.—[His Lordship here read the instrument.]—I will read the rule upon this subject from one only of the numerous authorities upon it; for I do not find that there is any substantial difference between the statement of the rule in any of the cases. The passage I select is from the judgment of C. J. Tindal, in *Hawes v.*

(a) 2 C. M. & R. 627.

(c) 5 M. & W. 638.

(e) *Hayes*, 364.

(b) 2 P. & D. 435.

(d) 6 Moore, 521; S. C. 3 Br. & B. 211.

(f) 10 A. & E. 334.

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Armstrong (a):—"It is not, however, necessary that the consideration "should appear in express terms; it would undoubtedly be sufficient in "any case if the memorandum were so framed, that any person of ordinary capacity must infer from the perusal of it that such, and no other, "was the consideration upon which the undertaking was given." Now, every word of that sentence is material; and we must see that every word of it is fulfilled before we can give judgment in favour of the guarantee. It is conceded that the mere promise of a third person to pay the debt of another at a future time, does not *per se* import a contract for forbearance: and if this were merely such a promise, we should have no difficulty in deciding for the defendant. But let us see whether this instrument does not contain a great deal more than a mere promise by one person to pay the debt of another at such future time. It is averred in the declaration that the plaintiffs, at the request of certain persons, viz., Joseph Denis Mullen and General Luscombe, had supplied gas to a certain hotel, and that Mullen and Luscombe had accounted with the plaintiffs of and concerning the said gas so supplied, and upon that accounting were found to be in arrear and indebted to the plaintiffs in £32, to be paid on request. It is then averred that the defendant was the receiver of the hotel, and the receiver of the monies and profits arising therein. In the instrument itself, indeed, "receiver" is the only word used; and it appears from that that the defendant, as receiver, undertook for the payment of the debt, with the sanction of the other persons, Luscombe and Mullen. It is in substance averred in the declaration, and not disputed,—or, rather, it is admitted by the plea, that the debt was the debt of Luscombe and Mullen—that it was a debt incurred by them in respect of a certain hotel—that they had an interest in that hotel—and that Parry, the defendant, was the receiver of that hotel for their use and benefit; and the import of the entire statement is, that these persons had authorised the defendant to appropriate the profits of the hotel to the payment of the debt. That being so, we may suppose, as it was put by the plaintiffs' Counsel, that all parties were present at this arrangement, and that the owners of the hotel sanctioned the receiver in appropriating, during the ensuing six months, so much of the property coming into his hands as receiver as would be sufficient to pay this debt. Would not that be a contract for forbearance? and how does it differ from the case of a bill of exchange? If, instead of sanctioning this appropriation of the profits of the hotel in the hands of the receiver, these persons had drawn a bill upon him payable at six months, and after it had been accepted by the receiver, had indorsed it over to the plaintiffs, that would have been a binding contract on the latter for forbearance. The plaintiffs could not have sued Luscombe and Mullen until the bill had arrived at maturity,

(a) 1 Scott, 668.

and had been dishonoured;—and could they, in this case, have sued them before the expiration of the six months, after being parties to the appropriation of a specific fund of the debtor, for the discharge of the debt within a given period?

I think it is to be collected by necessary inference from the face of this instrument, that the owners of this property gave their sanction to their receiver's appropriating so much of the profits coming to his hands, as would pay the sum due to the plaintiffs; and which he undertook to do within the period of six months; and in this view of it I cannot infer any consideration except that of forbearance for that period from the terms of the instrument. Therefore yielding implicit assent to the doctrine that a mere promise of one person to pay at a given time the debt of another, is not sufficient to sustain an action, I shall only observe that such a case is very different from the present, where there has been a specific dealing between the parties, binding the property of these persons during a certain period to the payment of the debt. Upon these grounds, I am of opinion, under the circumstances of the case, that the terms of this document do necessarily import that the forbearance alleged was the consideration of the contract; and that both demurrers must, therefore, be allowed. The preceding observations apply more directly to the first set of counts, but I conceive it to be unnecessary to advert more at length to the second; for it is obvious that if the consideration be sufficiently apparent on the one series of counts, it is equally so on the other.

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PENNEFATHER, B.

The instrument as set forth in the pleadings incorporates two promises. The first is to pay a past debt; the second to pay for a future supply of gas, as it should be furnished. The considerations for these promises are distinct: the one being forbearance to sue for a past debt, the other, the future supply of gas. The first set of counts is exclusively applicable to the first promise; the second embraces both. With regard to the promise the consideration for which was a forbearance to sue:—The grounds of the Chief Baron's opinion are exactly those on which my own is founded; and, in truth, were we to hold, that a contract for forbearance was not to be inferred from the memorandum in question, we should say, that the plaintiffs were guilty of a gross fraud on General Luscombe and Mr. Mullen. For, it appears upon the document, that those persons, who were the original debtors, *agreed* (the word "sanction" can have no other meaning) to the appropriation or retention of their property, towards the formation of a fund for the payment of this debt. I say, then, that if the creditors were to sue those persons before the expiration of six months, or if an action were maintainable *in presenti*, it would have been a gross fraud on Luscombe and Mullen, the original debtors, their property having been thus given over, and appropriated to

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the purposes of the agreement. In consideration of being allowed to retain these funds, the defendant, who was the receiver, makes an absolute promise to pay the debt at the end of six months; the promise is absolute, to pay the debt, whether the profits he was to receive should be more or less—that is, as between the defendant and the Gas Company. In that way, it appears to me, we are necessarily bound to infer that the consideration of the contract was a forbearance to sue for a period of six months, and that this case is thus distinguishable from *Wais v. Warlters* (a), and that class of cases. The plaintiff is, therefore, in my opinion, entitled to judgment on both demurrers.

FOSTER, B.

The question is, whether the Hibernian Gas Company, who are the plaintiffs here, undertook to give time for payment of the debt due to them? Now, I cannot put any other interpretation upon the terms of this instrument, than that they did undertake to do so; and I consequently concur in thinking that they are entitled to judgment.

RICHARDS, B.

I fully agree that a promise by a third person to pay the debt of another on a future day, is not of itself sufficient to support an action, and that a contract for forbearance is not necessarily to be inferred from such a promise. But, without trenching on any of the authorities which have been cited, or any of the principles to be deduced from them, I think we may well sustain the action in the present case. The memorandum, which is the foundation of the action, recites that the defendant was the receiver of an hotel, and that the guarantee was given with the sanction of General Luscombe and Mr. Mullen. All this appears from the document itself. It is also upon record, being averred in the declaration, that Luscombe and Mullen were the parties entitled to the profits of the hotel, and that they were the parties originally liable to the plaintiffs' demand. It was competent to the plaintiffs in this case to shew in their declaration the relation in which the parties referred to in the memorandum stood; this they have done, and from thence it appears that the original debtors dedicated their property to provide funds to pay this debt, and that those funds were thus made more peculiarly applicable to the payment of it. The defendant, therefore, who was the receiver of their property, promises in six months to pay the plaintiffs their debt, and makes himself personally liable to pay it, so far as language can do so. Surely, after obtaining the personal liability of their agent, it would be a plain breach of faith on the part of the creditor to sue the parties so primarily liable before the expiration of the six months mentioned in the

(a) 5 East, 10.

guarantee ; and yet, it is contended by the defendant that they might be sued on the very day after the execution and acceptance of the guarantee. *M. T. 1841. Exch. of Pleas.* I do not accede to any such proposition. There manifestly was an implied engagement at the time of entering into this guarantee by the defendant, that the parties in whose favour it was executed should be content to lie by for six months, and to sue neither Parry, nor the original debtors, during that period. *HIBERNIAN GAS COMPANY v. PARRY.* I, therefore, entirely concur in the judgment that has been pronounced by the Court. It was my opinion at a very early stage of the argument, that the averments on the record were such as might legitimately be made in this case, regard being had to the wording of the memorandum ; and that coupling these averments with the facts legitimately to be collected from the document itself, sufficient appeared to shew that a contract for forbearance existed in this case. With respect to the second series of counts commencing with the fourth, I shall not add any thing to what has already been said on that part of the case, the rather as my attention has been more particularly directed to the point which I have already discussed.

Allow both demurrers ; and judgment for the plaintiffs.

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OLDHAM v. DOWLING.

Trinity Term.
May 25.

(*Queen's Bench.*)

The rule for judgment may be entered on a plea of confession, with stay of execution at any time within a year from the time when the stay of execution expired.

MR. MOCKLER applied for liberty to enter the rule for judgment under the following circumstances:—the plaintiff having filed his declaration, the defendant gave a plea of confession, dated the 22nd of April 1841, with a stay of execution until the 26th of May 1841; on the 24th of May 1842 the plaintiff sought to enter the rule for judgment in the office, but the Officer refused to receive it, as more than a year had elapsed from the date of the plea.

Mr. *Mockler* insisted that he was entitled to his application, as a year had not elapsed since the time of stay of execution. The practice in the Common Pleas is, to enter the rule without objection within a year after the stay.

PERRIN, J.

Take the order, serving defendant with the rule and copy of this order.

April 28.
June 13.

HICKEY and HANBURY v. MOORE.

An affidavit to hold a party to bail need not be made according to the strict rules of legal evidence; and, *Semble*, that statements made upon hearsay and belief will be sufficient in such affidavit. —(Perrin, J., *dissentiente*.)

MR. JOHN D. FITZGERALD applied on behalf of the defendant in this cause, that the order obtained before Justice Burton in Chamber and the fiat issued thereon, be set aside; and that the defendant be discharged from custody, upon the terms of his entering a common appearance.

The affidavit of Robert Hickey, one of the plaintiffs, upon which the fiat had been obtained, stated,—that the defendant was indebted to deponent and his partner in the sum of £138. 2s. 9d., and that the same remained justly due and owing; that he verily believed if the defendant was served with process, and not forthwith arrested and held to special bail, deponent and his partner would lose their demand, deponent on

On a motion to discharge a party from custody, the Court will take the affidavits made on both sides into consideration, and if upon the whole there appear to be probable cause for believing the defendant is about to quit Ireland, the motion will be refused.

24th February last, having been informed by William Gill, of Ballyowen, which is within two miles of defendant's residence, that the defendant had been selling, or otherwise converting his farming stock and effects of every description into ready money, and was then making the necessary preparations for quitting Ireland, and proceeding to America, or other distant place beyond the seas, in order to avoid the payment of the several demands due by the said defendant, amounting to about £3000; and which information so received by deponent from William Gill, he positively believed to be true, said Gill being a person of respectability, and known to deponent for many years. The affidavit further stated, that he had made inquiry respecting the said defendant, and that Patrick Moore, his brother, who resides near him, informed deponent, and which he believed to be true, that deponent would hear something unpleasant about the defendant, who he stated was indebted to a large amount, and had committed forgeries on him; that he knows Patrick Moore for about ten years, and does not believe he would make such assertions respecting the defendant, if same were not in every respect true; from all which circumstances deponent positively saith, he believes it is the intention of the said defendant to abscond and quit Ireland, in order to avoid the payment of his just demands. Upon this affidavit a fiat was granted upon the 25th of February. There was a further affidavit made by Thomas Hickey, which stated, that after obtaining the fiat for the arrest of the defendant, he heard and believed it to be true, that the defendant had been arrested on a charge of forgery, at the prosecution of William Gill, and that he was then in the custody of the Sheriff of the King's County under said charge; and he positively stated, that he verily believed that if the defendant obtained his liberty therefrom without being detained under said writ so obtained on said fiat, deponent and his partner would lose their demand, it being the intention of the defendant to abscond.

The affidavit made by the defendant in support of this motion stated, that he was arrested by the Sheriff of the King's County under a writ of *capias ad respondendum*, issued upon an order to hold to bail. That the only knowledge he had of the proceedings in the cause, was his having been arrested as aforesaid, and positively stated, that he was not about to quit Ireland, when so arrested as aforesaid, that he had not then, or at any time previously, or has he now, any intention whatever of leaving Ireland. That he had read the affidavit of Thomas Hickey made on the 25th of February; that the information alleged by the said Hickey to have been received from Wm. Gill is utterly unfounded and untrue; for he positively states, that he had not been for fourteen or fifteen days before the swearing of the said affidavit, or previously, or at all, selling or otherwise converting his farming stock and effects of every description into ready money; and was not then, or previously, or at all, making preparations for quitting

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Ireland, and going to America or elsewhere out of said kingdom ; that he never had the slightest intention of quitting the country, or his house and farm situate in the King's County, in which he had a valuable interest and on which he had a valuable stock at tillage ; that he was engaged, when so arrested as aforesaid, in preparing, reclaiming, and tilling said farm, and since his arrest has continued by his labourers to till the same ; and that he did not before the swearing of said affidavit, or since, or at all, or does he intend to sell or dispose of his stock and effects otherwise than in the ordinary way of his business as a farmer and grazier. That if his brother informed the said Hickey that defendant had committed forgeries on him, as stated in said affidavit, same was utterly false and untrue, as deponent never committed a forgery on said Patrick Moore, or any other person whatever ; but admits Patrick Moore did accuse him of having forged his name, but that he subsequently admitted his signature was genuine.

There was also a joint affidavit made by Thomas Carey, a caretaker to the defendant, and Patrick Kelly, a farmer, which stated, that they had been for many years on terms of the closest intimacy with the defendant, and had been on terms of daily intercourse with him, [and that they did not believe he had any intention whatever of quitting Ireland ; and that he is not, to the knowledge of either of them, selling off his stock and effects, and converting them to ready money, for the purpose of quitting the kingdom, or for any other purpose ; and that there is at present on the farm of the said defendant a quantity of valuable stock and tillage belonging to said defendant.

There was a further affidavit of Robert Hickey in answer to the affidavit of defendant, which stated, that not having received any communication from the defendant in respect to the debt so due to this deponent, and being promised by defendant corn and other property in payment of such debt, and having made frequent applications to defendant, and having made inquiry from several respectable persons from the neighbourhood where defendant resided, all of which were to the effect that defendant did not intend to meet his engagements, and was secreting his person from arrest ; and having been informed by defendant's brother that defendant was charged with forgery ; and also being informed by William Gill that he was about leaving the country, and that he was removing his property from his residence by the canal boat, in the name of his brother ; and having been informed by the person who acted as corn-factor for the defendant, and which he believed to be true, that all property defendant was possessed of had been sold by public auction, for non-payment of rent ; and that defendant having been arrested on said charge of forgery, after deponent had obtained the fiat to arrest this defendant ; and having offered his brothers to take their or any reasonable security for payment of his demand, which they refused to give,

under the impression that defendant could not stay in the country; he applied to the Chief Justice of this Court, then presiding at the Assizes of Tullamore, and obtained liberty to lodge the writ so obtained on the fiat in this cause, such liberty being necessary in consequence of defendant being in custody on a criminal charge; and he stated, it was untrue as stated in defendant's affidavit, that he was arrested on said writ issued by this defendant. He further stated, that there was probable cause for believing that he was about to quit Ireland, unless he was forthwith arrested, and that nothing prevented his so doing, except his having been arrested on such criminal charge; and that he believes if he is not detained in custody he will quit the kingdom.

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Mr. *Fitzgerald* contended that the affidavit of Hickey was insufficient. It should state such facts as would shew there was probable cause to suppose the defendant was about to quit the country. There is no fact apparent on the affidavits, upon which the Court can form such a belief. Hickey merely states what he has heard from other parties, and does not state it of his own knowledge. An affidavit grounded on mere hearsay and on facts not within the actual knowledge of the party making it, is not sufficient to warrant the granting of a fiat for the arrest of a party; if such were permitted, a case might be easily trumped up, and a person deprived of his liberty on mere report for which there might be no foundation. The first objection is, the original affidavit has nothing in it to authorise the Judge to grant this warrant, the facts should be positively sworn to not upon hearsay, particularly where it is in the power of the party to do so. The second objection is, that the plaintiff, by the affidavit upon which the fiat issued, does not venture to pledge himself as to his belief, that the defendant is about to quit the country, which is absolutely essential in an affidavit of this kind; it may be argumentatively stated, but it is not substantially; it should, according to the terms of the Act, state that he is forthwith about to quit the country; he should have called upon Gill to make an affidavit, or stated some reason for his not having done so.

Mr. *Macdonagh, contra.*—As to the second objection, that the plaintiff has not pledged himself as to what his belief is, his affidavit states that if he is not arrested, and forthwith held to special bail, he will lose his demand. It has been decided that it is not necessary to introduce this belief of the parties; it is sufficient if the facts stated in the affidavit enable the Judge to form a belief; *Willis v. Snook* (a). As to the first objection, that the order was issued improvidently, that there was not probable cause, it is sufficient to shew defendant has an intention of

(a) 8 Mees. & W. 147.

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quitting the country, even although he swears he never contemplated it; *Duncan v. Jacob* (a). There is no denial by the defendant, of the facts stated in the affidavits, he should have got his brother to make an affidavit; he swears he was tilling his land when arrested, whereas he was actually in jail in Tullamore, and never was arrested but was kept in jail by a detainer. This is similar to the case of a writ of *ne exeat regno*. There is another objection; this application comes too late, it should have been made either in Vacation, or at the time for putting in bail; *Sugar v. Concanen* (b). The arrest was made on the 10th of March, this application was not made until the 20th of April; the time decided and fixed on is eight days in Term; *Cox v. Tullock* (c); *Fowell v. Petre* (d).

Mr. *Fitzgerald*, in reply.—The first section of the Act will be rendered nugatory if hearsay and belief is sufficient. This case is precisely similar to the case of *Bateman v. Dunne* (e). As to the case of *Willis v. Snook*, plaintiff must shew upon the facts that defendant is about to quit Ireland; where facts are not stated he is bound to pledge himself that the defendant is about to quit Ireland; *Hooke v. Duke De Rovigo* (f).

Mr. *Macdonagh* cited *Larchin v. Willan* (g), as overruling *Bateman v. Dunne*.

June 23.

On this day the Court delivered judgment.

PERRIN, J.

Having stated the affidavit upon which the fiat had been obtained, went on to say; this was an application to set aside the order made upon this affidavit for the arrest of the defendant, upon the grounds, that the affidavit was made on hearsay and belief, and that it did not shew any fact exhibiting an intention on the defendant's part to leave Ireland, except on the statement of a person of the name of Gill, and the defendant's brother. The plaintiff, in his affidavit, states what Gill told him, and if that be true, it would no doubt be probable cause for believing that the defendant is about to quit the country; but he has not, by his affidavit, shewn facts upon which, it could be presumed, that there was probable cause to suppose the defendant would quit the country; he has merely stated that Gill had told him so; he might have called upon Gill to make an affidavit, but he has not said that he did so. I do not think this a compliance with the statute. A mere hearsay statement is not evidence, either as

(a) 3 Jur. 1149.

(c) 3 Tyr. 578.

(e) 7 D. P. C. 105.

(b) 5 Mees. & W. 30.

(d) 5 D. P. C. 276.

(f) 3 Ir. Law Rep. 51.

(g) 7 D. P. C. 11.

oral testimony or written deposition, or on affidavits; it would not, on the trial of an action, be received as evidence of the existence of probable cause, because it is not proof on oath of the fact. Under the statute, in a proceeding of this nature, the plaintiff must shew by affidavit that it appears manifest the defendant intends to quit the country; he may shew this either by evidence within his own knowledge or from that of other persons, but this, I think, must be regular and legal evidence; this construction the words of the statute require. I find no authority against this view except a case reported in the *Jurist*, which does not appear in any other book of authorised Reports; in that case this question was not raised; it was decided on other grounds, although the affidavit, as reported, was merely on hearsay and belief. I am, therefore, indisposed to introduce a principle which I think to be dangerous, or rely upon evidence which appears to me not to have sufficient foundation; and for these reasons, in my opinion, the rule should be discharged.

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CRAMPTON, J.

This is a very important matter as to the practice of this Court. It is an application for a Judge's order for the arrest of a party, in support of which an affidavit has been made by the plaintiff. There are two matters to guard the Court from falling into an extreme one way or the other. There must be sufficient evidence to satisfy the Judge on the matter. If there be sufficient to ground a belief that the defendant is about to leave the country to avoid payment of his debts, and that the plaintiff is in danger of losing his demand, the Court is called upon to interfere. This is a *remedium festinum*, and the law is put on a new footing. I apprehend it was not the intention of the Legislature that the affidavit should be made according to the strict rules of legal evidence, and for this reason the facts upon which the application is grounded may lie within the knowledge of third persons, who may not be willing to make an affidavit, and if required, might bring it to the knowledge of the party, and thereby defeat the remedy; therefore, strict rules of evidence do not apply in this case. Before the passing of this Act there was a discretion in a Judge to order the arrest of a party in order to secure the plaintiff, as in the case of *tort*; strict legal evidence was not required in such cases. It was sufficient if the party laid probable grounds, if he shewed the defendant would escape if not arrested. We are not to require strict legal proof, but we should not grant a *fiat* without reasonable grounds for such. This is analogous to the case of *ne exeat*; in a case of that nature in the Court of Chancery, *Collinson v. ———* (a), the affidavit was not made by the plaintiff, but by another person and in

(a) 18 Ves. 353.

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another case; *Hyde v. Whitfield* (a). Lord Eldon said—"But is information and belief sufficient as to going abroad? the party must swear "that the defendant is going abroad, to his declaration to that effect, or "circumstances amounting to it." That is similar to the present case; I would deduce the same thing from the facts; I think the plaintiff should pledge his belief of defendant's intention; he should go further, he should state the grounds upon which he founds that belief. Declarations of the defendant are sufficient, or circumstances amounting to a declaration; as if he take any steps that amount to a conclusion that he intends to quit the country, or if his circumstances be failing: and when a man sells off his property, this is a circumstance amounting to a declaration that he is about to leave the country. The second question would arise here, was the affidavit upon which the order was made, sufficient? That affidavit is as loose an affidavit as could be made to hold a party to bail; but I do not think it very important to decide whether I should think it sufficient to keep a person in custody, for I find in England, where an affidavit has been made in reply, the Court takes all the affidavits into consideration and exercises its judgment upon them. There is upon these affidavits a probable cause for believing the defendant is about to quit the country; he states circumstances communicated to him by the brother of the defendant, and that he was informed that he was disposing of his property. The question then is, are the circumstances disclosed by these acts sufficient to satisfy the Judge. The words of the statute are—"If a plaintiff, &c., shall, by the affidavit of "himself or some other person, shew to the satisfaction of a Judge, &c., "that there is *probable cause for believing* that the defendant is about to "quit Ireland unless he be forthwith arrested, &c." These words shew that the Legislature did not intend there should be positive evidence, but that there was *probable cause for believing*. The order is for arresting a party until he gives bail, and that will detain him a very short time. The defendant comes here not relying on defects in the original affidavit, but on his own affidavit; this affidavit cannot be relied on, one fact makes that impossible, defendant must have known whether he was arrested under a criminal process or not. Under these circumstances, I think there was probable ground for believing this man was selling his property for the purpose of evading his creditors. I think, therefore, that there is probable cause for holding the defendant in custody, and that the cause shewn against the conditional order must be allowed.

BURTON, J.

I concur with my Brother Crampton. Even supposing it to be the fact

(a) 19 Ves. 344.

that there is a defect in the original affidavit, and that the Judge was incorrect in allowing it, still it is unnecessary to consider that question, for the defendant having made an affidavit in reply, we are entitled to look into it, and I think, upon the whole case, the defendant should not be discharged. This is a remedial Act, not one for the defendant, but for the plaintiff, in whose favour a special clause was made. If all this strictness was required as to legal evidence, the consequence would be, as my Brother Crampton has stated, that before you could get a person to make an affidavit, and get legal evidence of the whole matter, the creditor would be cheated of his demand. Upon the whole case it appears to me that there is probable cause for believing that the defendant was about to leave the country.

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Allow the cause shewn with costs.

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FARREL v. DONNELLY.

(*Exchequer of Pleas.*)

Nov. 23.

In debt for double rent under the 15 G. 2, c. 8, s. 9, *Ir.*, for not giving up possession pursuant to the tenant's notice to quit, the declaration must aver the notice to have been in writing.

DEBT, by landlord against tenant on the 15 G. 2, c. 8, s. 9, *Ir.*, for double rent, for not giving up the possession of certain premises pursuant to a notice to quit served by the tenant. The declaration did not aver the notice to have been *in writing*. Demurrer and joinder.

Mr. *Sproule*, for the demurrer.—The notice is not stated to be in writing in the English precedents, a literal adherence to which has obviously misled the pleader here. Under the English statute of the 11 G. 2, c. 19, s. 18, a parol notice is sufficient (a); but a notice in *writing* is necessary by the express words of the 15 G. 2, c. 8, s. 9, the analogous Irish Act.

The case was not argued for the plaintiff.

Per Curiam.

The declaration is clearly bad for the reason assigned. Therefore,—

Allow the demurrer and judgment for the defendant.

The plaintiff was subsequently permitted to amend the declaration on payment of costs.

(a) See Prec. 2 Chit. Pl. 495, 5th ed.; and see *Timmins v. Rowleson*, 3 Burr. 1603; S. C. 1 W. Bl. 533.

Executors of SPENCE v. FINN.

Nov. 26.

The copy of a serviceable *capias* must not vary from the original either in sound or sense.

MR. BREWSTER, Q. C., for the defendant, moved that the declaration filed on the 15th inst., in which "*William Duckett Spence* and Robert

Speuce Knox, executors of the Rev. Robert Spence, deceased," were plaintiffs, might be set aside; and also applied for the costs of the motion.

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There was a cross motion on the part of the plaintiffs, that the appearance entered for the defendant at the suit of "*William Duckett*, and Robert Spence Knox, executors of the Rev. Robert Spence," should be amended in accordance with the writ of *capias ad resp.* issued in this cause, by naming the said plaintiffs correctly.

This was an action of covenant, commenced by William Duckett Spence and Robert Spence Knox, as the executors of the Rev. Robert Spence deceased. In the *capias ad resp.* the names of both plaintiffs were stated correctly, but in the copy of the writ served on the defendant, the first plaintiff was called William *Ducket* instead of *William Duckett Spence*. On the 10th November the defendant's Attorney entered an appearance at the suit of the plaintiffs as named in the copy of the writ. On the 12th, the plaintiffs' Attorney served a notice on the Attorney for the defendant, stating that the name of a wrong plaintiff had been inserted in the appearance, and requiring him to enter a proper appearance for the defendant, describing the plaintiffs as named in the notice, which was entitled in conformity with the writ of *capias*; and apprising him that unless a proper appearance were entered for the defendant in compliance with the terms of that notice, a parliamentary appearance would be entered for him on the Monday following (the 15th). On the last mentioned day the defendant's Attorney served a notice in reply, insisting on the regularity of the appearance, inasmuch as the plaintiffs' names were therein stated in strict accordance with the copy of the writ served on the defendant. On the same day a declaration was filed, in which the plaintiffs were described as "*William Ducket Spence* and Robert Spence Knox, executors," &c., as in the writ. On the 20th November, the defendant served notice of the motion to set aside the declaration; and on the 23rd the plaintiff served notice of the cross-motion to amend the appearance.

Mr. *Molynceux* and Mr. *James*, for the plaintiffs, cited *Harman v. Nixon* (a); *Baker v. Neaver* (b); *Garner v. Weller* (c); *Gardiner v. Walker* (d); *Sellon's Prac.* 94; and contended that the provisions of the 43 G. 3, c. 53, ss. 3 & 6, *Ir.*, were intended to apply to parliamentary appearances only. In England, it is true, amendments have not been recently allowed in writs, unless to save the Statute of Limitations, or where there is merely a clerical error; but the decisions there having turned

(a) Ridg. L. & S. 183.

(b) 1 C. & M. 112.

(c) 11 Moore, 468.

(d) 3 Anstr. 935.

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upon the construction of the Uniformity of Process Act (2 W. 4, c. 39), are not authorities in this country. The defendant does not pretend that he has been misled by the omission complained of in the copy of this writ.

Mr. *Brewster*, Q. C., for the defendant.—This question arises on the 43 G. 3, c. 53; and the case of *Harman v. Nison* (a), the only Irish case cited, was decided several years before that Act was passed. The argument on the other side must be pressed to this extent, that in no case is it necessary to serve a correct copy of the *capias*. If the variance in this case be considered immaterial and the copy deemed sufficient, the very same principle would apply to a case where the plaintiffs, instead of being called by their proper names, as in the writ, are described in the copy as “John Doe and Richard Roe.” In *Byfield v. Street* (b), it is said the Court has power to amend a writ, because it is the act of the Court, and the record is in their own custody; but that it cannot amend the copy which is the act of the party over which the Court has no controul.—[CHIEF BARON. There is a still stronger case in the same book—*Nicol v. Boyne* (c).]—Yes, it is there laid down that the copy is insufficient, whether the alteration be in a material point or not.

BRADY, C. B.

The English decisions proceed upon the ground that the Act of Parliament there, in requiring service of a copy of the writ, requires that copy to be a true one; and in this respect they furnish a principle directly applicable to the construction of the Irish Act (d). Now, it is impossible to hold the copy in this case to be a true copy of the writ, the surname of one of the plaintiffs being omitted. In addition to the two cases in 10 *Bingham*, already adverted to, there is another in 1 *Ad. & El.* which is, if possible, stronger than either of them,—I allude to the case of *Hodgkinson v. Hodgkinson* (e), where Lord Denman says that it is as good a rule as can be laid down upon the subject, to hold that it is a variance if either the sound or the sense be altered. In these cases the Courts have gone to the very verge of strictness, which it is unnecessary for us to do in the decision of the present case.

PENNEFATHER, B.

It is better to adhere to the strict terms of the Act of Parliament than allow it to be frittered away by nice distinctions in every case

(a) Ridg. L. & S. 183.

(b) 10 Bing. 27.

(b) p. 339.

(d) 43 G. 3, c. 53.

(e) 1 Ad. & El. 533.

where a variance in the copy of a writ occurs; especially when we find that so much strictness has been observed by the Courts in England. It would otherwise be impossible to draw the line;—for if the omission of the surname of one of the plaintiffs be deemed immaterial, and the variance overlooked in this instance, the same principle will apply to the extreme case put by Mr. Brewster in the argument, namely, where the fictitious names of “John Doe and Richard Roe” are substituted in the copy for the real names of the parties in the writ; and yet in the latter case, it would be a proposition startling to common sense, to hold such a document to be a true copy of the writ. It is, therefore, better to adopt a general rule,—and to hold that where either the sound or sense is altered, the variance is fatal.

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RICHARDS, B., concurred.*

An order was made in the following terms by consent :—

It is ordered by the Court that the defendant's appearance be amended by stating one of the executor's names there as in *William Ducket Spence* instead of *William Ducket*; the plaintiffs' declaration to stand, and plaintiffs to begin their rules to plead anew; plaintiffs to pay to defendant the costs of one motion, to be taxed with all the documents of both motions.

* Foster, B., was absent.

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Hilary Term.
Jan. 18.

ISABELLA NUTTALL *v.* JOHN C. NUTTALL.
 SAME *v.* SAME.

Where a judgment has been satisfied under a warrant of Attorney fraudulently or improperly obtained, and the facts upon which the warrant is impeached, are clearly made out by the affidavits, the Court will, upon motion, set aside the satisfaction entered on the roll, without directing an issue or sending the case to be tried by a Jury.

MR. FITZGIBBON, Q. C., for the plaintiff, moved that the satisfaction entered on the rolls of the judgments in these causes, might be expunged, and that the warrants of Attorney upon which such satisfactions were entered, might be delivered up to be cancelled; and also for the costs of the motion.

The case had been previously before the Chief Baron in Chamber, and had been directed by his Lordship to stand over, with liberty to file further affidavits for the purpose of bringing the facts more fully before the Court. Several long and conflicting affidavits were filed on both sides.

The first judgment was entered in Easter Term 1828, for the principal sum of £540; and the second in Trinity Term 1831, for the principal sum of £60. It appeared that the defendant being indebted to his uncle, the late General Freeman, executed two bonds and warrants of attorney upon which the judgments in these cases were respectively entered. The plaintiff and defendant were brother and sister, and General Freeman, who died in 1834, by his will devised his real and personal estates to the plaintiff, his niece, whom he also appointed his executrix.

The plaintiff in her affidavit, amongst other matters, stated, that not being in immediate want of money and being unwilling to inconvenience her brother, she did not apply to him for payment either of the principal or interest of the sums secured by the judgments, for several years after her uncle's death; but that latterly being much distressed and in want of money, she was obliged in consequence of the repeated refusals of the defendant to comply with her applications for payment, to instruct her Attorney to take the necessary steps for enforcing payment of the judgments, which were accordingly revived in Michaelmas Term last. That on the 7th December 1841, W. Phillips, the son-in-law and Attorney of the defendant, called on her at her lodgings in Dublin, and proposed that she should take an annuity of £30 for her life, to be secured on the estate of the defendant, as an equivalent for her demand on foot of said judgments; that deponent, in reply, said she would consult her Attorney and consider of the matter, but declined then to give a decided answer to such proposal. That on the 9th December, Phillips again called, accompanied, on that occasion, by J. F. Nuttall, the son of the defendant, and produced papers which he said were to secure the annuity he had proposed on his previous visit, and required her to sign them. That deponent objected to sign any paper unless first approved of by Mr. Blennerhasset, her Attorney, in whom she stated she reposed implicit

confidence. That Phillips vehemently objected to her Attorney seeing the papers, and pressed her to sign them, as being entirely for her benefit, and designed to secure her a provision; and intimating that if she continued her proceedings, or resorted to her Attorney, she never would get a shilling of her demand, as other creditors would come in before her. That Phillips, on the same occasion, also threatened her with a bill which he stated was prepared and in readiness to be filed against her;—and that J. F. Nuttall joined in urging her to sign the papers, and in threatening her with the consequences of a refusal. The plaintiff further stated, that being in great distress, and fearing that she would lose the whole of her demand, which formed her only property and her sole means of subsistence, and being, moreover, old and nervous, ignorant of business and fearful of being involved in litigation, she was at length induced by the threats of Phillips and her nephew, and the urgency of their solicitations, to sign the papers, which she did, believing them to be for the purpose of securing the annuity. The plaintiff further stated, that it formed part of the agreement that she was to receive a sum of £40 in hand in addition to the annuity. That on a subsequent day (the 14th December), J. F. Nuttall again called upon the plaintiff, and presented to her a paper which he alleged to be the draft of an annuity deed, and upon which he required her to endorse her approval; that she declined to write any thing on the paper before shewing it to her Attorney, and requested it might be left with her for that purpose, but that the said J. F. Nuttall refused to comply with her request.

It appeared that the papers which the plaintiff had executed under the circumstances above detailed, were the warrants upon which satisfaction had been entered on the judgments in these cases.

The defendant's affidavit stated, that in the year 1828, he the defendant being indebted to his uncle, the late General Freeman, executed to him the bonds and warrants upon which the judgments in these cases had been entered; that General Freeman's object in obtaining these judgments was to protect and preserve his (the defendant's) property for his family; and that it never was General Freeman's intention to make the defendant pay the sums secured by the judgments. The defendant, by his affidavit, further charged that the plaintiff was well aware that such had been the object and intention of the testator. That plaintiff had frequently promised to deliver up the bonds to be cancelled. That no payment had ever been made on foot either of the bonds or judgments; and that no demand of payment had been made by the plaintiff until about a year ago—to which demand he admitted he returned no answer, believing it to have been made at the instigation of the plaintiff's sister and the sons of the latter, by whose advice the defendant charged the plaintiff had instituted the proceedings on foot of the judgments.

Affidavits were also made by W. Phillips and J. F. Nuttall, denying

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the truth of most of the statements in the plaintiff's affidavit of what had occurred at the various interviews preceding the execution of the warrants of attorney. It appeared from their account of the transaction, that a series of negotiations, commencing on the 24th November, had been carried on with the plaintiff, which terminated in a distinct agreement that the judgments should be satisfied; that Mr. Blennerhasset's costs of reviving the judgments should be paid; and that the plaintiff should receive an annuity of £30 for life, secured by a deed to be executed by the defendant and his sons, J. F. and G. W. Nuttall; and that it was also agreed that a sum of £40 should be advanced to the plaintiff for her present exigencies. They further stated that the plaintiff, in presence of a witness, executed the warrants without hesitation or compulsion, Mr. Phillips having previously read them over to her, and fully explained their nature and effect; and denied that he represented the papers as intended to secure the annuity, or that they had made use of the means to procure her signature attributed to them by the plaintiff. They admitted, however, that previously to the execution of the warrants, the plaintiff expressed a wish that the papers should be left with her until the next morning, in order that she might shew them to her Attorney; that J. F. Nuttall thereupon observed that "it was strange that Mr. Blennerhasset had not before then called upon her; that he (J. F. Nuttall) was satisfied that "Mr. Blennerhasset was really the Attorney of her (the plaintiff's) sister; "and that from the hostility already manifested to the defendant in that "quarter, any interference on the part of the plaintiff's sister, or her sons, "or their Attorney, would only tend to break off the amicable arrangement already entered into;" that thereupon the plaintiff sat down and deliberately signed the papers.

Mr. Phillips further deposed that he consented to act gratuitously in bringing about an arrangement between the parties; and that it was not from any wish to conceal the proceedings from the plaintiff's Attorney, that he acted without his intervention; but that deponent did so at the express desire and request of the plaintiff, who, seeing that the costs were to come out of the defendant's pocket, and that he, the deponent, was not to receive any remuneration, was desirous to save every expense that could possibly be avoided. It was further stated, that it was clearly understood throughout the negotiations that the judgments were to be satisfied, as the first step towards an amicable arrangement; and it was added, that a draft of the annuity deed was prepared and laid before Counsel, with instructions to peruse and settle it on behalf of all parties; that the deed having been approved of by Counsel, had been executed by the defendant and his sons, but had not been tendered to the plaintiff for execution, in consequence of the present proceedings.

The deed (which was produced by the direction of the Court upon the motion) contained a covenant by the defendant and his sons for the

payment of the annuity, but did not bind the real estate of the grantors; it also contained a proviso against alienation by the grantee, on pain of forfeiting the annuity. H. T. 1842.
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In a further affidavit made by the plaintiff, she denied that General Freeman's object in obtaining the judgments against the defendant was to protect his property, as alleged by the latter, but that on the contrary she believed the said General Freeman never had any intention of giving up the debt secured by the said judgments, in corroboration of which she entered into a detail of a variety of matters connected with the private history and affairs of the deceased.

Mr. *Fitzgibbon*, Q. C., for the plaintiff.—There is no substantial distinction between a warrant to enter, and a warrant to satisfy a judgment. The same principle which gives the Court jurisdiction in the one case gives them jurisdiction in the other, and warrants of attorney to enter up judgments have been frequently set aside on the ground of fraud and misrepresentation: *Duncan v. Thomas* (a); *Doe dem. Locke v. Franklin* (b); *Harrod v. Benton* (c); *Martin v. Martin* (d). The Common Law Courts have ever exercised an equitable jurisdiction over their own judgments and process, and if necessary will direct an issue; *Cox v. Rodbard* (e); *Cooke v. Jones* (f); *Fell v. Riley* (g); *Anonymous* (h). With respect to the annuity deed, it cannot be taken into account; it is not such a security as the plaintiff under the circumstances was entitled to; and it was, in all probability, executed by the defendant and his sons since the service of the notice, and for the purposes of this motion.—[RICHARDS, B. That seems by no means improbable.]—The case of *Bateman v. Ramsay* (i) is an authority that sustains this motion, and the Court of Common Pleas there set aside a warrant of attorney to satisfy a judgment, as having been improperly obtained.

Mr. *Hatchell*, Q. C., and Mr. *Butt*, *contra*.—This application is not sustainable either on principle or precedent. The plaintiff seeks by a summary proceeding to obtain that relief which (if entitled to at all) she can only obtain by filing a bill in a Court of Equity. This Court is called on to overturn, upon motion, a family arrangement deliberately entered into, and to undo the plaintiff's own solemn act. With contradictory affidavits, and conflicting statements on both sides, the Court is

(a) 1 Doug. 196.

(b) 7 Taunt. 9.

(c) 8 B. & C. 217; S. C. 2 M. & Ryl. 130.

(d) 3 B. & Ad. 934.

(e) 3 Taunt. 74.

(f) Cowp. 727.

(g) *Ibid*, 281.

(h) 2 Ken. 294. And see *Hayes v. Hare*, 1 H. Bl. 664; *sed vide Gennor v. Macmahon*, cited 1 Sugd. V. & P. 269, 10th ed.

(i) 1 Sausse & Sc. 470.

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not now in a position to form a correct opinion upon the merits of the case. The plaintiff's statement does not contain either a fair or impartial account of the transaction; and even, on her own shewing, it is manifest she was perfectly satisfied with the annuity. That annuity has been secured by the defendant's deed; and although he is but tenant for life, the grant has been corroborated by his sons, both of whom have executed the deed. As a preliminary step to the proposed arrangement it was stipulated that the judgments should be satisfied in the first instance.—[RICHARDS, B. Even supposing this to have been a fair and reasonable arrangement under the circumstances, still the judgments ought not to have been satisfied; but, on the contrary, ought to have been kept outstanding as a security for the payment of the annuity.]—In strictness, perhaps, that is the course which ought to have been adopted; but if there be any question as to the sufficiency or form of the security, the defendant is willing to let that be determined either by a reference to Counsel or by the decision of the Court.

The Court will not upon motion make an order to set aside the satisfactions entered on these judgments,—no case has been cited on the other side in which it has ever been done. As to *Bateman v. Ramsay* (a), it is distinguishable, for there the warrant was a perfect nullity. But it has been contended, that the Court may set aside a warrant to satisfy a judgment, on the same principle that it exercises its jurisdiction over a warrant to enter up a judgment. There is, however, a wide difference between the cases. In the one, the Court exercises a judicial act, and in entering a judgment, the form of the entry accordingly is—"It is considered by the Court;" but on entering satisfaction on the judgment roll, the Court exercises no judicial act, it being altogether the act of the party. This appears from the form of the entries in 3 *Lord Raymond*.—[The COURT here intimated that they had inspected the judgment rolls in these cases, from which it appeared that a judicial act was as much implied in the entry of satisfaction as in the entry of the judgment.]—That being so, it must be admitted that the ground of the distinction which has been suggested is not tenable; but the cases are distinguishable upon other grounds. In the first place, warrants of attorney to enter judgments are irrevocable, but all others—including, of course, warrants to satisfy judgments—may be revoked. This distinction is taken in 1 *Tidd*, 550, 9th ed., where the cases are collected. Again, warrants of attorney to enter judgments have been regulated by Rules of Court,* and by a recent Act of Parliament,† guarding their execution by certain formalities; but similar restrictions have not been imposed

(a) *Sausse & Sc.* 470.

* See the 38th General Rule, *Yeo*, N. R. 56; *Moore & Lowry*, 276.

† 3 & 4 Vic. c. 105, ss. 10 & 11.

upon the execution of warrants to enter satisfaction. In consequence of the conflicting statements in this case, independently of any question as to the jurisdiction, the Court would not interpose without directing an issue—a course which would entail a ruinous expense upon both parties.

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Mr. *Rolleston* in reply.

BRADY, C. B.

The argument of this case has occupied much of the public time, but I will not say that it has done so either unnecessarily or improperly, inasmuch as it involves a question—important as regards the jurisdiction of the Court—of some importance in amount as regards the persons litigating—and important as regards the professional character of one of the parties concerned. When the case originally came before me in Chamber, I felt it to be one involving all these considerations, and therefore suggested the propriety of letting the case stand for the full Court; and in order to have all the facts brought before us, I gave permission to have supplemental affidavits filed.

It has been strongly urged on the part of the defendant, that the Court has not jurisdiction to make such an order as is sought for by the plaintiff; and for a considerable time I was anxious to discover some authority on which to rest in making the order, as on principle I could see no distinction between the case of a warrant of attorney to enter a judgment, and a warrant of attorney to satisfy a judgment already entered. On examining the judgment-roll, and the forms of the entry of the judgment, as well as of the entry of satisfaction, I find that in both cases there is an act of the Court. The act in the one case, is a judgment of the Court imposing on the defendant a liability to a certain demand; the act in the other case, is in like manner a judgment of the Court exonerating him from that demand; the one is a judgment *for* him, the other is a judgment *against* him. This is fully borne out by the case of *Wilson v. Charlesworth* (a), which I discovered in the course of the argument, and which I look on as an express authority for an exercise of the jurisdiction sought for. In that case the Court treat the entry of satisfaction as a judgment, and expressly designate it as such. On principle then, as well as on authority,—the authority of the case I have just referred to, and that of *Bateman v. Ramsay*, reported in *Sausse v. Scully* (b),—I am fully satisfied we have jurisdiction to deal with this judgment which the Court has been made to pronounce (I say emphatically, *made* to pronounce), and to set such judgment aside if it has been obtained on fraudulent or improper grounds. It would be fraught with most mischievous and dangerous consequences if we had not

(a) 1 Barnard. K. B. Rep. 320.

(b) p. 470.

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such jurisdiction, and if the evil that might be committed in the case of a forged warrant of attorney to enter up satisfaction, as in the case in *Barnardiston's Reports*, could not be remedied save by the tedious and expensive process of an equity suit.

Having, therefore, full jurisdiction to deal with this judgment, the question arises—Is this case one in which we ought to exercise it? The ground of Miss Nuttall's complaint is, that she was induced to execute these warrants by misrepresentations, and without having received any equivalent for doing so; and without having had the assistance of the advice of her Attorney.

In regard to warrants to enter judgment, there are rules of Court, and an Act of Parliament, which in many cases require the presence of an Attorney on behalf of the executing party at the time of execution. Although this may not be one of the cases to which the rule applies, it is a circumstance not to be lost sight of, that this lady requested the interposition even of a day, or a night, in order that she might have an opportunity of submitting these documents to the gentleman who had been acting as her Attorney, and who was known to have been so by the parties pressing her to execute the warrants: but the request was refused. Now, it was the bounden duty both of Mr. Phillips, and of Mr. J. F. Nuttall to have acceded to such a request. Considering the peculiar situation in which the former stood, so far from opposing such a request, he should at once have agreed to it, or even of his own accord have suggested to this lady the propriety of consulting her Attorney. With respect to Nuttall, the reasons assigned by him on that occasion for the immediate execution of the warrants, demonstrate that he knew the character of this old lady to be such, and the situation of her affairs to be such, that she might easily be swayed by the advice and influence of those about her at the time.

I do not think, therefore, that satisfactory reasons have been given for withholding from this lady an opportunity of communicating with her Attorney. However, if I was satisfied that she knew her rights, and that knowing them she had entered into this arrangement with a view of conferring a benefit on these parties, I should be slow to disturb it, even though that arrangement had perhaps been carried into effect by means of some little pressure, or even though the annuity deed had been executed after the service of the notice of this motion. But, under the circumstances of this case, can we be satisfied that the arrangement put forward by the defendant was really the arrangement into which this lady intended to enter?

It is stated that Mr. Nuttall, the defendant, is tenant for life, and it is not stated whether his sons who join him in the annuity deed have any interest in the property or not. There can scarcely be a doubt, but that when they proposed to join their father in executing the deed, the plaintiff

believed and was under the impression that they were to join in securing the annuity on their own property. But the deed is not so framed—it is not stated whether the sons had any estate, and the only security into which they enter is, by joining in a personal covenant for the payment of the annuity. Again, this deed contains a covenant on the part of this lady against alienation, on pain of forfeiture,—a covenant or clause reasonable and proper enough, perhaps, when the annuity proceeds from the bounty of the grantor, but quite out of place in a deed of this description, where the grantor receives a *quid pro quo* from the grantee, and where a benefit is given for a benefit received.

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It is therefore idle to say, that this deed was settled by Counsel on behalf of all parties. I take it for granted that it was settled by Counsel according to the instructions furnished by the Attorney—but certainly it is not such a deed as the plaintiff would have been entitled to, according to the arrangement stated even by the parties themselves. I am not at all satisfied then, that the annuity has been secured in the way in which this lady intended it should be; and being of opinion that the warrants of attorney were obtained prematurely, or at all events acted upon prematurely, and before any equivalent had been secured to the plaintiff for the judgments she had against the defendants,—and, moreover, not being at all satisfied that the plaintiff was not coerced into this arrangement by the menace of a bill being filed against her in the event of her refusal,—I am clearly of opinion that the satisfaction entered on the rolls of these judgments should be set aside with costs.

RICHARDS, B.

I concur in opinion with the Chief Baron, that the Court has jurisdiction to interfere where a vacate has been entered upon the judgment roll by means of a warrant of attorney improperly obtained. With respect to this particular case, if the matter was not quite clear and plain upon the affidavits, it would be our duty to have it inquired into by a Jury; but if we find upon the admissions of the parties themselves, and the facts which are not in controversy between them, that these warrants of Attorney were improperly obtained, I think the Court has power to determine the question without the intervention of a Jury, and I do not see the necessity of subjecting the parties to the expense of ulterior proceedings, by sending the question to be tried on an issue (a). Now I will take Mr. Phillips's own account of the transaction,—and although I think it but fair to that gentleman to state my belief that he acted rather from mistake than from any improper motive,—yet it is impossible not to see that this unfortunate lady (admittedly in a state of utter destitution) was, throughout the entire of these negotiations, in the power of her opponents.

(a) *Vide acc. per Lord Tenterden, in Harrod v. Benton*, 8 B. & C. 219.

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His Lordship here entered into a minute examination of the particular facts of the case as stated in the affidavits, and concluded by expressing his opinion that the satisfactions ought to be set aside.

LEFROY, B.

I concur in the judgments pronounced by the other Members of the Court, and I should not consider it necessary to add any thing to what has been already said, were this not a case of much novelty, and one which involves a question of considerable importance with respect to the jurisdiction of the Court. I am of opinion that the case has been properly brought before this Court at the Law side, for there alone can that complete relief be administered to which the party is entitled; for on the Equity side of this Court, or in Chancery, the Court could not remit the parties to their original rights, or set up the judgments which have been satisfied.

The case which has been discovered by the industry and research of the Lord Chief Baron, is a direct authority that the Court has the same jurisdiction in the case of a warrant to satisfy, that it has in the case of a warrant to enter up a judgment; and in regard to the latter, the cases cited by the plaintiff's Counsel distinctly shew that when such warrants have been obtained by fraud or imposition, the Court will immediately act, and set the judgments aside. The case cited by the Chief Baron was the case of a forged warrant, but a warrant of attorney obtained by fraud is as much a nullity as if the warrant were forged. The question in the present case then comes to this—must these warrants, in contemplation of law, be considered as obtained by fraud and surprise, and therefore deemed nullities? I think they must: but do not, however, mean to say that they were obtained by that sort of moral fraud or actual imposition which consists in wilfully and falsely representing a thing to be what it is not—as, for instance, in the present case, representing to the plaintiff that these papers were designed to secure the annuity; and indeed I do not found my opinion so much upon the plaintiff's affidavits, as upon the affidavits filed on the part of the defendant, and the *res gestæ* of the case, upon which I think it impossible to hold that these warrants are binding, or to say that the acts done in pursuance of them ought to be upheld. What are the circumstances? The leading one is, that to which my Brother Richards has already adverted, namely, that the party whom it is sought to bind by these warrants, was throughout in the hands of her adversary's Attorney.

It is obvious that at one period, at all events, this lady was desirous of having the assistance of Mr. Blennerhasset, her own Attorney. Mr. Phillips says that it was at the plaintiff's request that Mr. Blennerhasset was not called in, as the plaintiff was anxious to save expense; but that very circumstance imposed on Phillips the same duty that would have

devolved on Blennerhasset, had the latter been actually called in and acted as the plaintiff's Attorney.

I do not mean to impute any improper design to Mr. Phillips—but the fact of this lady having placed herself in his hands (and indeed the very circumstance of his being her nephew by marriage), cast upon him the duty and obligation of protecting her rights. But how were they protected? Not only were the warrants executed, but the judgments themselves were satisfied before the agreement for the annuity was so much as reduced to writing. It is said, however, that she was "satisfied" to execute the warrants; but that, in my mind, only serves to shew her weakness and her utter incapacity to act for herself, without the aid and intervention of her professional adviser; and does it not also shew, on the part of Phillips, a total neglect of that important duty which devolved upon him as the plaintiff's Attorney? This case is strongly illustrative of the inconvenience and mischief arising from the same Attorney acting as the agent of both parties, and forcibly brings to mind the observations of Lord Redesdale upon that subject, in the case of *Watt v. Grove (a)*. See the inconvenience resulting from it here:—Mr. Phillips seems altogether to have lost sight of the new duties he undertook, and the new relation in which he stood to the plaintiff.—[His Lordship here proceeded to comment upon other parts of the case.]—This then is a case in which the entire transaction shews that this lady was incompetent to act for herself,—in distress, and without assistance, or rather with the semblance of assistance, but without its reality, she was induced to resign her all—to give up her only means of subsistence,—without at the time having one shilling secured to her as a compensation for the claims she conceded. When apprised of her imprudence, she quarrels with the arrangement, and losing no time, she on the earliest opportunity comes to this Court for redress—and to that redress I think she is entitled; for looking to all the facts of the case, and to the defendant's own version of them, it seems clear that these documents must, under the circumstances, be deemed to have been obtained by fraud and surprise, and that the satisfaction entered on the judgment rolls by virtue of them, must consequently be set aside.*

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Mr. *Fitzgibbon* applied that the warrants of attorney should be brought into Court in order that they might be cancelled.

BRADY, C. B.

The authority of the Court to direct that to be done is by no means so

(a) 2 Sch. & Lef. 492.

* Pennefather, B., was absent.

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The following was the order made:—

It is ordered by the Court, that the satisfactions entered on the rolls of the judgments in these causes, be set aside with costs, and the said warrants of attorney be delivered up to the plaintiff to be cancelled; plaintiff undertaking to do any reasonable act (at the defendant's expense) that she may be required, to exonerate defendant's estate from the annuity granted by him.*

* See further as to vacating the entry of satisfaction on the judgment roll, *Moore and Lowry's Rules*, 209, and cases cited *ibid*.

Jan. 24.

Lessee DEMPSEY v. NOWLAN.

By the practice of this Court in ejectment cases, the cause is not considered at issue until the second declaration is filed; and three Terms must, therefore, elapse from that time before judgment as in case of nonsuit can be obtained.

MOTION for liberty to enter up judgment as in case of nonsuit.—This was an action of ejectment on the title. The first declaration was filed in Trinity Term 1840, and defence taken in the same Term; the second declaration was filed on 3rd May 1841, and on the 18th of June a motion was made before the Chief Baron in Chamber, by the defendant, for liberty to confine the defence, and to compel the plaintiff to amend his declaration pursuant to such limited defence—which motion was granted; and pursuant to the order, the second declaration was amended, and defence confined accordingly. On the 3rd July 1841, the plaintiff served notice of trial for the last Summer Assizes, but the notice was subsequently withdrawn.

Mr. *R. C. Walker*, in support of the motion.—In the Queen's Bench, the cause is considered at issue when defence is taken, and in this Court, from the time the plea is filed; it is not necessary to file a second declaration before applying for judgment as in case of a nonsuit; *Lessee Mullan v. Wilton* (a); *Lessee O'Herlihy v. M'Carthy* (b); *Longfield on Ejectment*, 101; *Moore & Lowry's Rules*, 25.

Mr. *Fearon* and Mr. *Coates*, *contra*.—If the three Terms are to be computed from the time defence was taken, the cause is out of Court; *Hussey v. Hussey* (c); but if from the time the second declaration was

(a) Sm. & Bat. 73.

(b) *Ibid*, 74.

(c) *Hayes*, 528.

filed, the three Terms have not yet elapsed. The practice of this Court is stated in *Lessee Allen v. Trant* (a), and in the note there. If necessary, it might be contended that the cause was not at issue until the declaration, as amended pursuant to the order of the 18th June, was filed.

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Mr. Durdin, in reply.—It is unnecessary to file a new declaration when the defence has been limited; nor is limiting the defence a joining of issue anew; *Lessee Sullivan v. Sullivan* (b).

BRADY, C. B.

It is an incorrect statement of the Exchequer practice to say, that it is not necessary for the defendant to file a second declaration before applying for judgment as in case of a nonsuit, or that issue is joined when the plea is filed; for the Officer informs us, that according to the settled practice of this Court, issue is not considered as joined for the purpose of a motion like this, until the second declaration is filed. In the Queen's Bench, as appears from the case of *Lessee Mullan v. Wilton* (c), the second declaration need not be filed until after notice of trial has been served; but, in this Court, notice of trial cannot be served until the second declaration has been filed. In the report of *Lessee Allen v. Trant* (a) the practice has been misconceived, the word "*nonsuit*" being there used instead of "*non pros.*" As three Terms have not elapsed since the cause was at issue by the second declaration being filed, this motion is premature, and must, consequently, be refused with costs.*

(a) 1 Cr. & D. 116.

(b) 3 Law Rec. N. S. 131.

(c) Sm. & Bat. 73.

* Pennefather, B., absent.

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KELLY, Attorney, v. ANTISEL.

Jan. 27.

Where an action was brought on two bills of costs, to one of which the defendant admitted and to the other disputed his liability; the Court, upon his application, referred the undisputed bill for taxation, upon the terms of the defendant lodging with the Officer /a blank plea of confession, to be filled up with the amount to which said bill should be taxed, in case plaintiff should not recover the disputed bill of costs; but if the plaintiff should obtain a verdict on the latter, the amount of such verdict to be included in the plea of confession.

MR. BREWSTER, Q. C., on behalf of the defendant, applied that the bill of costs furnished by the plaintiff to the defendant in this cause, amounting to the sum of £178. 5s. 9d., for proceedings taken by plaintiff on the said defendant's behalf, in the Equity side of this Court, in a certain cause in which James Patterson was plaintiff and the defendant and others were defendants, should be referred to the proper Officer, to tax and ascertain the same, the defendant undertaking to pay said costs when so taxed and ascertained, and also to pay the costs incurred in this cause as between party and party, up to the service of the notice of this motion, when taxed and ascertained; and that plaintiff should be restrained from further proceeding in his action for said bill of costs, without prejudice to his right to proceed in the action for recovery of a certain other bill of costs alleged to have been incurred in the said cause, for and on behalf of Thomas Antisel, deceased.

The action was in fact brought for the recovery of two bills of costs; the plaintiff's right to recover one of these bills is admitted by the defendant, who seeks to have that bill referred for taxation, without prejudice to the plaintiff's right of proceeding for the other. The motion appears to be one which the Court will grant as of course.

Mr. E. M. Kelly, *contra*.—In England it is doubted whether the Courts have any jurisdiction independent of the statute (a); and even in cases within the statute, they refuse the order where there is any deviation from the usual undertaking; *Hobby v. Pritchard* (b). In this country, it must be admitted, that the jurisdiction of staying actions brought for untaxed bills of costs is exercised; *Bastable v. Reardon* (c); but that is only done in cases where the defendant admits the whole cause of action, and not when, as here, he disputes a part of it. The course which should have been adopted by the defendant in this instance was, to have lodged money in Court. Should the Court, however, be willing to yield to this application, the plaintiff will, nevertheless, be entitled to the costs of this motion, as the defendant has not offered the proper terms. He should have undertaken to give the plaintiff a judgment as of this Term, or to lodge a blank plea of confession with the Officer, to be filled up with the

(a) 12 G. 2, c. 13, s. 23, *Eng.*; 7 G. 2, c. 14, s. 9, *Ir. Dagley v. Kentish*, 2 B. & Ad. 211; and see *Jones v. Roberts*, 2 Dowl. Pr. C. 656;—and the observations of Alderson, B., in *Berrington v. Phillips*, 1 Mees. & W. 49.

(b) 2 Mees. & W. 724.

(c) 1 Jebb. & B. 91.

amount of the bill of costs when taxed; *Kildahl v. Nangle* (a). In this case there has been considerable *laches* on the defendant's part. The bills of costs, which are the subject matter of the action, were served in September last—the writ was served in October—declaration filed and issue joined in Michaelmas Term—and yet there was no notice of this motion until the day on which notice of trial is actually served.

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Mr. *Brewster*, in reply, referred to a case in this Court, in which he was concerned as Counsel for the defendant; the action had been there brought upon six bills of costs, five of which being admitted by the defendant, he made an application to stay proceedings in terms the same as the present, and which was granted by the Court, although opposed on the part of the plaintiff.

*Per Curiam.**

Let the said bill of costs, amounting to the sum of £178. 5s. 9d., be referred to the proper Officer for taxation, defendant to lodge a blank plea of confession with the Officer, to be filled up with the amount to which said bill of costs shall be taxed, in case plaintiff shall not recover on any trial to be had, the bill of costs alleged to have been incurred in said cause of *Patterson* against *Antisel*, for and on behalf of Thomas Antisel, deceased; but if on said trial plaintiff shall obtain a verdict for the said bill of costs, the Officer to add in said plea of confession the amount of said verdict to the amount of the taxed bill of costs so taxed as afore-said; defendant undertaking to pay the costs of this action, when taxed, up to the service of the notice of this motion, and all further costs, to abide the result of any trial to be had; plaintiff to be at liberty (this day) to withdraw his notice of trial already served, without costs, and defendant to pay the costs of this motion to plaintiff without further order.†

(a) 1 Cr. & D. 18.

* Brady, C. B., and Richards, B.

† Two late cases, one decided by the Court of Exchequer in England (*Williams v. Griffith*, 6 Mees. & W. 32), after conference with the other Law Courts in that country, and the other by the Court of Queen's Bench in Ireland (*Bastable v. Reardon*, 1 Jebb & B. 91), may be regarded as having settled the practice on this subject at least to this extent, that the Courts will exercise a jurisdiction and stay the proceedings in an action for an Attorney's bill of costs, wherein any one item is for business done in the Court where such action is brought. Indeed the Court in the latter case went further, and stayed the proceedings in an action where the bill of costs contained an item for business done in some one, although it did not appear in which,

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of the *Superior Courts*. But there seems to be still a doubt as to what terms they will, in such cases, impose on the defendant. In a late case (*Executrix of M'Namara v. Walsh*, 2 Jebb. & Sy. 90), the Court granted the application upon a mere undertaking by the defendant to pay the costs when taxed and ascertained, and would not compel him to give a blank plea of confession,—and that where the action was brought by the personal representative of the Attorney. In like manner this Court, in two cases *Balfe v. Sharkey*, Glass. 150, and *Wright v. Buchanan*, *ibid*, 156), refused to put the defendant under similar terms; while, on the other hand, in the case of *Kildahl v. Nangle*, cited above, as well as in the principal case, they imposed such terms—and this would now seem to be the settled practice of the latter Court. Where a party suffers an action to be brought against him on a bill of costs, it is but reasonable that he should not be allowed to derive any advantage from his own neglect, in not availing himself of the statutory month to compel a taxation; and, therefore, that when in such a case he seeks to stay further proceedings, he should be obliged to place the plaintiff in the same position as if his proceedings were to be regularly continued, either by undertaking that he should be at liberty to enter judgment as of the Term in which he could have done so if he had not been stayed, or by lodging a blank plea of confession as in the principal case.

It seems pretty clear, that the plaintiff is, under these circumstances, entitled to the costs of the action up to the service of notice offering the proper terms; although in *Eastable v. Reardon*, where the notice did not offer any such costs, the plaintiff was visited with the costs of the motion. But the fact of the notice not having offered to the plaintiff the costs of the action up to the period of its service, was not relied on by his Counsel—whose arguments were altogether applied to the Court's want of jurisdiction.

It may be prudent for Attornies to demand the payment of interest on their bills of costs, which can be done by the introduction of a clause to that effect, into the usual notice appended to bills of costs when about to be served. If such a demand be made, there is fair ground for contending that they will be held entitled to interest, under the statute 3 & 4 Vic. c. 105, s. 53, and that the Officer will be directed to tax such interest whenever an application is made to the Court for the purpose of staying proceedings in an action on a bill of costs. See *Berrington v. Phillips*, 1 Mees. & W. 48; S. C. 1 Tyr. & Gr. 323; 1 Gale, 404; 4 Dowl. Pr. C. 478.

Appendix

TO THE QUEEN'S BENCH REPORTS.

REGINA *v.* MILLES.
SAME *v.* CARROLL.

THE prisoner Milles was tried for bigamy at the last Spring Assizes for the county of Antrim, before Perrin, J., when the Jury found, under the direction of his Lordship, the following special verdict : *—“ We find that “about thirteen years ago, to wit, in January 1829, the prisoner, George Milles, accompanied by Hester Graham, then spinster, and three other persons, went to the house of the Rev. John Johnstone, at Banbridge, “in the county of Down; the said Rev. John Johnstone, then and “there being the placed and regular Minister of the congregation of “Protestant Dissenters, commonly called Presbyterians, at Tullylish, “near to Banbridge, aforesaid : and that the said prisoner, and the said “Hester Graham then entered into a contract of present marriage in the “presence of the said Rev. John Johnstone, and the said other persons ; “and that the said Rev. J. Johnstone then and there performed a religious “ceremony of marriage between the said prisoner and Hester Graham, “according to the usual form of the Presbyterian Church in Ireland ; and “that after the said contract and ceremony, the prisoner and said Hester “for two years cohabited and lived together as man and wife, the said “Hester being after that period of said ceremony, known by the name of “Milles.” And the Jurors further say,—“ That the said George Miller was, “at the time of the said contract and ceremony, a member of the Established “Church of England and Ireland, and that the said Hester was not a “Roman Catholic ; but the Jurors aforesaid do not find whether she, the “said Hester, was a member of said Established Church, or a Protestant “Dissenter.” And the Jurors further find—“ That afterwards, upon the “24th day of December 1836, while the aforesaid Hester was still living, “the said George Milles was married to one Jane Kenedy, then spinster,

* The case of *The Queen v. Carroll* was tried at the last Spring Assizes for the county of Armagh before Crampton, J., and a special verdict was found, which did not essentially differ from the verdict in *Milles' case*, except in finding that both parties were members of the Established Church. Judgment was given in both cases at the same time.

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"in the parish church of Stoke, in the county of Devon in England,
"according to the forms of the said Established Church, by the then
"officiating Minister of the said parish, he being then and there a Priest
"in holy orders." And the Jurors further find—"that the said George
"Milles afterwards, on the 2nd day of September 1841, was apprehended
"and in custody in Belfast on the charge of bigamy, because of his having
"so married the said Jane Kenedy, as aforesaid. And the Jurors pray
"the advice of the Court, and soforth."

This special verdict came on for argument in this Court on the 26th of April, and was argued for several days,—when PENNEFATHER, C. J., and BURTON, J., were of opinion that the marriage was invalid and that there should be judgment for the prisoner; and CRAMPTON, J., and PERRIN, J., were of opinion that the marriage was valid, and that judgment should be given for the Crown. PERRIN, J., in order to allow the question to be brought before the House of Lords, formally withdrew his judgment.

[The arguments and judgments in this case ran to so great a length, that it would be utterly impossible to curtail them so as to suit the limits of this work, and preserve them at all intelligible to the reader. They will be found fully reported in the published report of this case by Messrs. Smyth and Bourke, and also in the report of Mr. Dix, a copy of which will be found in the Law Library, Four Courts.]

END OF VOLUME FOURTH.

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3. If there be no cause in Court, the affidavit, upon which a *fiat* is sought to be obtained, requires a two-shilling stamp; but if a cause is pending, no stamp is necessary: therefore, where there was no cause in Court, and an affidavit without a stamp was filed, entitled as if in a cause in Court, and a *fiat* obtained thereon, the proceedings were set aside. Q. B. *Plunket v. Plunket* 366

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this not appearing to be a contract exceeding £20 in value, did not require a stamp; secondly, that it was a continuing contract, and could not be put an end to without notice. Q. B. *Hickey v. Browne* 277

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possession of the premises, was bad, as not being warranted by the submission; but that it was separable from the residue; and that the award for the amount of the improvements was good. L. E. *Murphy v. Bellew* 313

2. To obtain execution under the provisions of the 3 & 4 Vic. c. 105, s. 27, for a sum of money awarded, the party seeking it must move for an order nisi on the opposite party to pay it, which, on being made absolute, gives the Court jurisdiction. C. P. *Kelly v. St. George* 420

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1. The Court refused to discharge a defendant in arrest under a *ca. sa.* out of custody, although the plaintiff omitted to lodge with the Sheriff, at the time of issuing the execution, a certificate of the sum due, according to the provisions of the 6 Anne, c. 7; but the plaintiff was put under terms to enter an appearance to an action for an illegal arrest, to be brought on this statute by the defendant, the former being at the time resident out of the jurisdiction. Q. B. *Irwin v. Staunton* 270
2. The defendant having been arrested on a criminal charge of intent to defraud the plaintiff and abscond, which was not prosecuted; and afterwards arrested on a Judge's *fiat*, obtained on an affidavit, which was sworn whilst he (the defendant) was in custody, stating the plaintiff's belief of an intention to sell his property and leave Ireland, as commonly reported in the neighbourhood. The Court refused to discharge the defendant from custody on entering a common appearance, he having only sworn that he had never sold, nor was it in his contemplation to sell, his property, with the view of leaving Ireland. C. P. *Innes v. Waters* 311
3. Where an affidavit upon which a *fiat* had been obtained for the arrest of a party under the 3 & 4 Vic. c. 105, was filed without having a stamp upon it, no cause being pending in Court at the time between the parties, the Court set aside the *fiat*, and ordered that the

ARREST.

bail bond executed by the defendant and his sureties, should be delivered up to be cancelled upon his entering a common appearance. Q. B. *Plunket v. Plunket* 366

4. *Quære*.—Must an action have been commenced before a *fiat* can be obtained? *Ibid*

5. A party having been arrested on a writ, which turned out not to have been indorsed, as required by the 43rd General Rule, and having, while in custody, filed a petition under the Insolvent Act, which he afterwards abandoned, but on which one of his creditors was applying to have an assignee appointed;—the Court would not discharge him out of custody. C. P. *White v. Kidd* 406

6. An affidavit for a Judge's *fiat* to arrest a party need not be made according to the strict rules of legal evidence; and, *Semble*, that statements made upon hearsay and belief will be sufficient in such affidavit.—(Perrin, J., *dissentiente*).—Q. B. *Hickey v. Moore* 468

7. On a motion to discharge a party from custody, the Court will take the affidavits made on both sides into consideration, and if upon the whole there appear to be probable cause for believing the defendant is about to quit Ireland, the motion will be refused. *Ibid*

ASSIGNOR, ASSIGNEE AND ASSIGNMENT.

See DEEDS, 5.

BANKRUPTCY AND INSOLVENCY, 1, 6.

JUDGMENT, 22.

PUBLIC COMPANY, 1, 2.

SCIRE FACIAS, 1.

1. It is not necessary in a *scire facias*, at the suit of the assignee of a judgment, to make *proof* of the assignment, the memorial being the assignment. Q. B. *Barry v. Hoare* 97

2. Nor is it necessary to specify the time of the entry of the memorial upon the roll. *Ibid*

3. To come within the word "assigns" in the Registry Acts, it is not necessary that the party should be an assignee of

ASSUMPSIT.

3

all the premises comprised in the deed which he seeks to register, nor that he be an assignee in law for all purposes.—*Per Pennefather, C. J., in Murphy v. Leader* 146

ASSISTANT BARRISTER AND HIS COURT.

See CERTIORARI.

PLEADING, 28.

REPLEVIN, 3.

ASSUMPSIT.

See BANKRUPTCY AND INSOLVENCY, 1.

EVIDENCE, 4, 5, 6, 7.

PLEADING, 3, 4, 5, 6, 7, 9.

1. On a careful examination of the several cases which have been cited in the argument, it will be found, that wherever a promise by defendant, on the giving up a distress, or the forbearing to sue a third person, has been held binding as an original promise, the consideration has moved to the party who has made the promise. *Per Doherty, C. J., in Bull v. Collier* 113

2. A. being seized of an estate for life, agreed to convey the same to B. his son, in consideration of a certain annuity, and also that the son should pay his debts, which were enumerated in a schedule annexed to the deed of conveyance. When the parties were about to execute this deed, it was discovered that a debt due by bond from A. to C. was omitted in the schedule, and A. refused to execute the deed until B. wrote a letter stating that A. "having at the time of the execution of the deed conveying his estate to me, stated that there was a debt due by him to C. in the sum of £350, which sum is not included in the schedule at foot of said deed of conveyance, I agree to secure and pay the same, &c., in order that A. may be released and discharged from payment thereof."—C. accepted of this letter shortly after it was written, received two sums on account of interest upon the bond debt from B., and had not afterwards looked to A. for payment of the sum secured thereby, but B. had at one time offered to pay the whole of the

principal sum to C. An action of *assumpsit* was brought for recovery of this debt by C. against B.; *Held*, that this action could not be maintained; first, upon the ground that if the contract by B. was considered as a collateral agreement, the letter did not shew a sufficient consideration to sustain the action; and secondly, in order to charge him upon it as an original undertaking, a release by C. to A., or an offer to execute such release ought to have been relied on and established. Q. B. *Cooper v. Foster*

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3. The defendant, by a written agreement took a house from the plaintiff, at a certain yearly rent "above taxes;" the succeeding tenant having been obliged to pay an arrear of taxes which had accrued due during the period of the defendant's occupancy, was allowed by the plaintiff to take credit in his rent for the sum so paid:—*Held*, that the plaintiff might recover the amount in an action of *indebitatus assumpsit* for money paid to the defendant's use. L. E. *Thorpe v. Heron*

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ATTORNEY.

See COSTS, V.

AUCTIONEER.

1. It is not necessary for the special bailiff of a Sheriff to take out a license as an auctioneer, or to employ a licensed auctioneer, to entitle him to sell, by public cant or auction, in the usual way, goods taken in execution by him under a civil bill decree; he not being thereby a person carrying on the trade and business of an auctioneer within the meaning of the 6 G. 4, c. 81, s. 26. Q. B. *Regina v. Martin*
2. *Quære*—Is the 46th section of the 6 & 7 W. 4, c. 75, repealed by the 1 Vic. c. 43, s. 3? *Ibid*
3. The Masters in Chancery are authorised to sell lands and properties under decrees by public cant or auction, which are exempt from duty; they do not use the assistance of a licensed auctioneer, and they have never been considered thereby to carry on the trade and business of an auctioneer. And if these

Officers, in selling those large estates by public cant, are not to be considered to use and exercise the trade and business of an auctioneer, so we are of opinion that a special bailiff, under a civil bill decree, selling to the amount of 5s. or £5, what it his duty to sell, is not subject to the penalty sought to be imposed in this case; and we are, therefore, of opinion that the order of acquittal must be affirmed. Q. B. *Per Perrin, J.*, in *ibid*.

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BAIL IN ERROR.

See COSTS, 10.

BAILIFF.

See SHERIFF, 2, 3.

BANK AND BANKING COMPANY.

See JUDGMENT AS IN CASE OF NONSUIT, 1.

PLEADING, 4.

SCIRE FACIAS, 2, 3.

BANKRUPTCY AND INSOLVENCY.

See, also, SHERIFF, 1.

1. In Easter Term 1840, the plaintiff sued the defendant in *assumpsit* upon a special contract, to which the defendant pleaded that after the filing of the declaration, the plaintiff being a prisoner, filed his petition as an insolvent debtor, praying to be discharged pursuant to the Statutes for Relief of Insolvent Debtors, and conveyed and assigned all his interest in all his real and personal property to the provisional assignee, and that said petition was not dismissed, and that said indenture was in full force and effect. The plaintiff replied, that after he was arrested and executed the said assignment, and before said plea was filed, he settled the debt for which he had been arrested and in prison, and did not further proceed with his said petition, and was discharged out of prison with the consent of his detaining creditor, and did not obtain his discharge from prison by virtue of any order or adjudication of said Court, whereby the jurisdiction of said Court over the said matter of said petition became determined, and the

said assignment became inoperative and void. To this replication the defendant having demurred generally, the Court allowed the demurrer, upon the ground that the right to sue was vested in the provisional assignee. *Q. B. Mowlds v. Power* 163

2. The case of *Evans v. Brown*, 1 Esp. 169, questioned. *Ibid*

3. Nothing can be more distinct than the difference in respect to this question (the right of an insolvent to sue), between the law in Bankruptcy and that under the Insolvent Acts, for this plain reason that the Bankrupt Statutes do not contain one word about the *dismissal of the petition*. *Per Pennefather, C. J., in ibid* 165

4. There is one exception to the general rule which is, that where the bankrupt becomes entitled to any thing for his own services, there he may recover; and that rule is founded upon this principle, that the assignee in such a case is not entitled to hire out the bankrupt for the benefit of his creditors, but the bankrupt himself is entitled to what he earns in that way. *Per Pennefather, C. J., in ibid*

5. The words "if the Court should so order" in the 3 & 4 *G. 4*, c. 124, s. 15, do not render it necessary that the assignee should obtain an order for the purpose of enabling him to sue, but he may institute proceedings without any such order; these words being merely affirmative of the right of the assignee to institute such suit, given *ex abundante cautela*. *Per Pennefather, C. J., in ibid* 167

6. Where the goods of a trader were seized by the Sheriff under an execution issued upon a judgment obtained by confession on a warrant of attorney; and after the seizure but before the sale, the trader committed an act of bankruptcy:—*Held*, (*RICHARDS, B. dissentiente*), that trover lay at the suit of the assignee for the recovery of the value of the goods against the execution creditor, to whom the Sheriff had paid over the proceeds of the sale without notice of the bankruptcy. *L. E. Hudson v. M'Allen* 438

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See, also, INSPECTION OF DOCUMENTS, 1.

PLEADING, 6.

In assumpsit by payee against maker of a promissory note, payable in the body at a particular place; *Held*, that a promise by the defendant after it became due, to pay the amount of the note, was evidence of the debt under the money counts, and dispensed with the omission in the declaration of a special count averring presentment at the particular place, and with proof of such presentment. *Q. B. Carnegie v. Kirby* 392

BILL OF PARTICULARS.

See, also, EJECTMENT, 15.

After plea, a special case must be made for a delivery of a bill of particulars. An affidavit that they are necessary for the defence, is not sufficient. *C. P. Blackwood v. Jones* 328

BISHOP.

See EVIDENCE, 3.

BURGESS.

See CORPORATION, 1.

CALLS ON SHARES.

See PUBLIC COMPANY.

CAPIAS.

See, also, ARREST.

1. *Semble*—that the *Christian* and *surname* of the Attorney for the plaintiff should be signed in full at the foot of the English notice attached to the *capias*. *Q. B. Coffey v. Barrett* 81
2. It is no irregularity to include more than one defendant in a *capias*, and declare against them separately afterwards. *Q. B. Crawford v. M'Donnell* 104
3. The copy of a serviceable *capias* must not vary from the original either in sound or sense. *L. E. Executors of Spence v. Finn* 476

CASE.

In an action for maliciously, and without probable cause, issuing a search warrant to search the plaintiff's house, for goods

alleged to have been stolen from the defendant; the Judge charged the Jury that, in his opinion, there would be sufficient to constitute probable cause, if they believed the facts given in evidence, and left it to them on the whole of the case to find whether there had been probable cause or not; and also directed them to find for the plaintiff, if they believed that there was any malice on the part of the defendant.—*Held*, that the direction was right, and that the Jury having found for the defendant, the Court could not interfere in granting a new trial. C. P. *Power v. Harrison* 122

CERTIORARI.

The Court can issue a *certiorari* to bring up the record of the Assistant Barrister's Court. C. P. *Fitzsimon v. Lyons* 222

CESS-PAYERS.

See GRAND JURY.

CHURCH LIVINGS.

See EVIDENCE, 3.

CIVIL BILL COURTS.

See CERTIORARI.
PLEADING, 28.
REPLEVIN, 3.

COLLATERAL PROMISE AND AGREEMENT.

See ASSUMPSIT, 1, 2.
PLEADING, 3, 7.

COLLATIONS.

See EVIDENCE, 3.

COMMISSION TO EXAMINE.

See WITNESS, 1.

COMMISSION AND INQUISITION.

See EVIDENCE, 3.

COMMISSIONER.

Where a Commissioner for taking affidavits neglected to enrol his commission upon his appointment, the Court allowed it to be enrolled *nunc pro tunc* in order that the suitor should not be prejudiced by such neglect. Q. B. *Lessee Symes v. Ejector* 381

CORPORATION.

COMPANY.

See PUBLIC COMPANY.

CONDITIONAL ORDER.

See PRACTICE, 8.

CONSENT.

See, also, COSTS, 2, 5.

The Court will not, on consent of the parties, allow a judgment to be amended on the roll by encreasing the sum for which it was entered by mistake from the principal to the penalty of the bond. C. P. *Cromie v. Browne* 219

CONSIDERATION.

See ASSUMPSIT, 1, 2, 3.
PLEADING, 5, 6, 7.

CONSOLIDATING DEFENCES.

See EJECTMENT, 15.

CONSTRUCTION OF STATUTES.

See DEEDS AND CONVEYANCES, 6.
IRELAND.
PUBLIC COMPANY.
TOLLS.

CONTRACT.

See AGREEMENT AND CONTRACT.

CORONER.

See MEDICAL PRACTITIONER.

CORPORATION.

1. The appeal given under the 50th section of the 3 & 4 Vic. c. 108, against the right of a burgess to remain upon the burgess roll, being a proceeding analogous to an application for an information in the nature of a *quo warranto*, cannot be moved within the last four days of Term. Q. B. *Anonymous* 103
2. Rating under the Act for the relief of the poor in Ireland, must have been in existence for twelve months prior to the 31st of August in the year in which the Municipal Corporation Act (3 & 4 Vic. c. 108) comes into operation in any borough in Ireland. Therefore, as the poor rate was first struck in Limerick in September 1840: *Held*, that that statute could not come into operation in that borough until the year 1842; as a twelve months' rating to the poor prior to the 31st of

August would not be completed until August in that year. The matters required to be done by the 38th section of that statute are essential, and the Act is in regard to them imperative, and not merely directory—(Perrin, J., *dissentiente*.) Q. B. *The Queen v. Vereker* 382

COSTS.

See PLEADINGS, 26, 27.

SERVICE OF PROCESS, 17, 18.

I. Generally.

1. Where the defendant had not, pursuant to several notices, the last of which bore date the 27th of October, signed a consent to make a rule of *Nisi Prius* of the 18th of June a rule of Court, until the 29th of October, and after expenses incurred by the plaintiff in preparing for a motion to have it entered up with costs, of which notice had been served on the same 29th, and an offer on his part to withdraw it on the payment of the actual expenses incurred, the Court ordered the said rule of *Nisi Prius* to be made a rule of Court, with costs against the defendant, notwithstanding the conditional order had been obtained within the first four days of Term. C. P. *Regan v. Francis* 6
2. A party will not be ordered to pay the costs of a motion to set aside a judgment regularly obtained, even although a consent had been previously tendered, offering the same terms that were ordered by the Court. C. P. *Waldron v. Hussey* 134
3. The costs of appearing to oppose a motion to change the venue upon the usual affidavit, will not be given where the motion is not moveable until within the last four days of Term. C. P. *Mara v. Murphy* 138
4. In an action of trespass for assault and battery, which was tried upwards of five years before, in which the Jury found one farthing damages for the plaintiff, and the costs were taxed and paid by the defendant in ignorance of the 2 G. 1, c. 11, ss. 14, 15, the Court refused to direct the plaintiff or his Attorney to repay the amount to the defendant; *Held, also*, that where the verdict has

been for the plaintiff, the defendant is not entitled to have his costs, no matter what may have been the amount of damages found. C. P. *Wynne v. Shea* 221

5. The defendant having entered a rule to stay proceedings until costs of plaintiff not proceeding to trial were paid, may afterwards apply for a conditional order on the plaintiff to pay the said costs, without discharging the aforesaid rule. C. P. *Lessee Horsfall v. Jennings* 218
6. When a plaintiff served a consent to be allowed to amend, which did not contain an offer of the costs, and also served a notice of motion for the same purpose, which did contain an offer to pay the costs—the Court in granting the motion refused to give costs to either party. C. P. *Haward v. Mason* 411

II. Costs in Criminal and other Courts.

7. Where the process-server was prosecuted by the defendant, and convicted of perjury, the Court set aside the civil proceedings with costs, but refused to make the plaintiff pay the costs of the prosecution. L. E. *Lewis v. Hynes* 177
8. The Court have not jurisdiction to order a party to pay to another costs incurred in equity proceedings. C. P. *Lynch v. Lynch* 298
9. The defendant having prosecuted and convicted the process-server of perjury, under an order of the Court, the Court set aside the parliamentary appearance and all the subsequent proceedings, with costs, and the costs of obtaining the order to take the affidavit off the file; but refused the costs of the motion, because the notice asked the costs of the proceedings in the Criminal Court. C. P. *Fahie v. Nash* 304
10. *Quære*.—Has the Court any jurisdiction, under any circumstances, to order the plaintiff to pay to the defendant the costs incurred by him in the prosecution and conviction of the process-server in the Criminal Court? *Ibid*
11. This Court will not upon motion, pronounce an order for payment of the costs of attending to oppose a notice of bail in error which proves ineffectual from

the non-attendance of the plaintiff in error to perfect his recognizance. L. E. *Executors of Middleton v. Sadlier* 434

III.—Security for.

12. In ejectment on the title, a defendant will not be compelled to give security for costs, unless fraud or collusion is clearly shewn. Q. B. *Lessee O'Brien v. Dwyer* 380
13. The Court granted a conditional order under the provisions of 1 G. 4, c. 87, with liberty to serve the same on the party who had taken defence, and on any other persons appearing to take defence, but directed that the said order should be served on the party taking defence, as well as on her Attorney. The rule was to shew cause within six days after service. C. P. *Lessee Clooney v. Ejector* 330
14. Where a plaintiff who resides abroad, but has property in this country, has been in the country since the commencement of the suit, and swears that it is his intention to prosecute the action and remain here until it is settled, the Court will not require him to give security for costs. C. P. *Sisson v. Cooper* 401
15. In proceeding under the 1 G. 4, c. 87, it is not necessary that the fact of the lease or agreement having been produced to the Court, should appear on the face of the conditional order. C. P. *Lessee Clooney v. Ejector* 413
16. The demand of possession need not have been made before the expiration of the lease or interest. *Ibid*
17. The lessor having died before the expiration of the lease, on the 1st of May 1841, and letters of administration having been taken out on the 24th of the following December, and demand of possession made on the 4th of the next April. *Held*, not to be such *laches* as would disentitle the party to proceeding under the 1 G. 4, c. 87. *Semble*—if the occupying tenant could shew a fair equitable claim for an extension of the lease, the Court would not make absolute the conditional order. *Ibid*
18. A personal representative residing out

of the jurisdiction of the Court, will be ordered to give the defendants in a *scire facias* security for costs. C. P. *O'Brien v. Upton* 419

IV.—Execution for.

19. The Court will not order a *fi. fa.* to issue under the 3 & 4 Vic. c. 105, s. 27, for the recovery of costs which the defendant had become liable to pay, by not having appeared at the trial to confess lease, entry, and ouster. C. P. *Lessee of McDonald v. Lawlor* 329
- V.—Taxation of—and Solicitor's Lien.
20. A petition praying that the respondent, who was an Attorney, might be ordered to tax his costs, and that he should furnish a list of credits, without alleging misconduct on the part of the respondent in having refused the credits required, or an undertaking on the part of the petitioner to pay the amount of the costs when ascertained; *Held*, to be irregular, and that the respondent was entitled to the costs of the application from the petitioner. C. P. *Roddy v. Conroy* 135
21. Where an action is brought in this Court by an Attorney for the recovery of his bill of costs, and it appears that there is *one* taxable item in the bill, although that be for business done in some of the other Courts of Law, and none of the business has been done in this Court, the Court will stay the proceedings, and refer the bill to be taxed, upon an undertaking by the *defendant's* Attorney to pay same when taxed and ascertained, independent of the 7 G. 2, c. 14, from the inherent jurisdiction which the Court exercises over its own Officers. Q. B. *Bastable v. Reardon* 167
22. Where an action was brought on two bills of costs, as to one of which the defendant admitted, and as to the other disputed, his liability; the Court, upon his application, referred the undisputed bill for taxation, upon the terms of the defendant lodging with the Officer a blank plea of confession, to be filled up with the amount to which said bill should be taxed, in case plaintiff should not recover the disputed bill of costs; but if the plaintiff should obtain a verdict on

the latter, the amount of such verdict to be included in the plea of confession. L. E. *Kelly v. Antissel* 492

23. In an action of assault and battery, the plaintiff having obtained a verdict with forty shillings damages,—and being indebted to the defendant in a larger sum than the amount of the costs of this action, was afterwards discharged as an insolvent debtor—the circumstance of the Attorney and his brother having stated that he had been paid his costs, although he now swore that the said statement was untrue,—*Held* sufficient to let in the equities between the parties, and deprive the Attorney of his lien on the judgment for costs. C. P. *Ronayne v. Doherty* 332

24. The parties having entered into a consent, which was made a rule of Court, that the proceedings in a replevin suit should be stayed, on the terms of the plaintiff investing one moiety of the arrears and accruing rent for certain specified purposes, and paying the other moiety to the defendant; *Held*, that the Attorney for the defendant had no lien on the accruing rent for his costs. The Court ordered the Attorney to pay the costs of the motion, it appearing that the bill of costs was large and *untaxed*, and only a small balance due on foot of it. C. P. *Regan v Francis* 402

COUNSEL.

See CRIMINAL LAW, 4, 7.
PLEADINGS, 15.

CRIMINAL LAW.

1. Where a statute declared that from and after the 1st of September 1839, any and every society established at the passing of the Act, or thereafter to be established, of the nature thereafter described, “*shall be and be deemed and taken to be an unlawful combination and confederacy*,” and then proceeded, “that is to say, any and every society so constituted that the members thereof may or shall communicate with, or be known to each other by, or may use for the purpose of being known as such, any

secret sign or signs, or password or passwords,” &c. : and having continued a specification of several other matters, the existence of which in any society would constitute it a society within the statute; it declared that the persons so offending “shall be deemed guilty of unlawful combination and confederacy :” an indictment under this statute stated, “that on the 24th of August, *and thence continually hath been, and still is* established in Ireland, a society so constituted that the members thereof might and did communicate with, and were known to each other by certain secret signs and certain passwords; and that said James Brady, &c., on the 24th of August, and long before, was a member of the said society; and that the said James Brady, after the 1st of September 1839, to wit, on the 5th of October, &c., being then and there such member of the said society as aforesaid, unlawfully did act as a member thereof, against the peace,” &c. &c. ; *Held*, upon a writ of error brought to reverse the judgment, after verdict, that this count was sufficient, without any averment to the effect, that the defendant was thereby guilty of unlawful combination and confederacy. Q. B. *Brady in Error v. The Queen* 21

2. *Sembla*.—That the count would be bad upon demurrer, by reason of this omission. *Per* Perrin, J. *Ibid*
3. *Sembla*.—That a count under this statute, charging the defendant with having “in his possession a certain written copy of certain passwords made use of in the said society,” without setting them out, is bad. *Ibid*
4. In this country, in all criminal cases, even where the defendant brings a writ of error, the Counsel for the Crown are entitled to the reply: *aliter*, in England. This Court will consider the present practice, with a view of altering it. *Ibid* 27
5. Where an indictment under that statute stated, that “before the 24th of August 1839, there was established in Ireland, to wit, &c., a society so constituted, that

the members thereof *did* communicate with, and were known to each other by secret signs and passwords; and that the said society so established previous to the 24th of August, and from thence until and at the time of the commission of the said offence hereinafter, &c.; and the said society has not yet been dissolved or put an end to: and that Richard Jones, before the 24th of August was a member of the said society, and being such member of the said society, did after the 1st of September 1839, act as a member of the said society, and did then and there commit the offence of unlawful combination and confederacy; against the peace, &c., and contrary to the form of the statutes, &c. *Held*—sufficient after verdict. Q. B. *Jones in Error v. Regiam* 264

6. The test, that an indictment is bad, if the facts stated in it may be true, and yet the prisoner innocent, is not invariably true. *Ibid*

7. This Court will abide by the established rule in criminal cases in this country, to give the Counsel for the Crown the right of reply, although the practice in England is otherwise, the party who opens being there held entitled to the reply. *Ibid*

8. On a motion to discharge a prisoner from custody, on the ground that there is no offence charged in the informations upon which he has been committed, notice must be given to the Attorney-General: overruling *Rex v. Stewart*, Batt. 139. Q. B. *Regina v. Carroll* 372

9. An indictment under the 9 G. 4, c. 56, s. 24, charging three persons with pulling down and demolishing part of a dwelling-house; *Held*, bad as against two of those persons, it not having stated that they were in possession of the premises; *Held*, secondly, that it was bad against all, it not having charged them with demolishing the whole house, or with beginning to demolish the whole, or with demolishing part with intent to demolish the whole. Q. B. *Regina v. Hawthorne* 373

10. To an indictment for misdemeanour the prisoner demurred, and the Judge of Assize allowed the demurrer; the Crown brought a writ of error, and this Court, in Trinity Term, reversed the judgment of the Court below; in the following Term the Attorney-General moved that the defendant should be brought up to receive sentence; *Held*, that this Court had fully exercised its jurisdiction in reversing the erroneous judgment of the Court below, and that it was not authorised to go further and pass sentence upon the prisoner. Q. B. *Regina v. Houston* 174

11. In a prosecution for a misdemeanour, if the defendant demurs to the indictment and the demurrer is overruled, he has no right to answer over to the offence charged against him, but sentence may be pronounced at once upon him. It is otherwise in cases of felony. *Ibid*

CROWN.

See EVIDENCE, 3.

1. In this country in all criminal cases, even where the defendant brings a writ of error, the Counsel for the Crown are entitled to the reply: *aliter*, in England. The Court of Queen's Bench will consider the present practice with a view of altering it. Q. B. *Brady in Error v. The Queen* 27
But see *Jones in Error v. Regiam* 264

2. The defendant demurred to the inquisition and return of the Sheriff to a writ of extent; and the demurrer was allowed. The Crown applied for liberty to quash the former proceedings and to issue a new extent; *Held*, that the Court might make it part of the terms upon which they would grant the application, that the Crown should pay the costs of the former proceedings to the defendant. Rev. Ex. *Regina v. Perrin* 429

CRUELTY.

See EVIDENCE, 4, 5.

CURRENCY.

See DEEDS, 3, 4.

DEATH OF PARTIES.

DEATH OF PARTIES.

See EJECTMENT, 17.

In *scire facias* at the suit of the assignee of the personal representative of the conusee, it is not necessary to state in the writ the time of the death of the conusee. Q. B. *Barry v. Hoare* 97

DEBT.

See PLEADING, 8.

PUBLIC COMPANY.

DECISIONS—OBSERVED UPON QUESTIONED & OVERRULED.

1. *Smith's case* (1 East, P. C. 183; S. C. 2 Bos. & Pul. 127), and cases of the same class, questioned. Q. B. *Per* Per-
rin, J. in *Brady in Error v. The Queen* 21

2. The Lord Chief Baron (Brady), concurs in the view taken by Baron Richards in *Feighney's case* (Walsh's Rep.), as to the test of value required by the Reform Act; and as to the opinion of the majority of the Judges upon registry questions reserved, not being binding upon the minority; and differs from Judge Crampton's views on both these questions as propounded in *Smith's case*, Al. Reg. Cas. 327. *In re Larkin* 46

3. The case of *Edwards v. Kelly* (6 M. & Sel. 204), commented upon, and the correctness of some of the passages in the judgments questioned. *Per* Ball, J., in *Bull v. Collier* 115

4. The case of *Brandling v. Barrington* (6 B. & C. 475), commented upon in *Murphy v. Leader* 139

5. The case I have just referred to—(*Brandling v. Barrington*, 6 B. & C. 475)—and which has been relied on, was in its immediate decision a perfectly well-founded decision; and the attempt that was made to extend the statute in that case was a perfectly wild attempt, and the observations of Lord Tenterden, and of the other Judges, were quite warrantable in that particular case. All the Judges in that case expressly said was, that such a case as the one then before them was never in the contemplation of the Legislature in framing the Act, but that extending the statute to that case

DEEDS, &c.

11

would be legislation, not construction, and I quite agree with them; but that case leaves the rule untouched, that where a case is within the object and contemplation of the statute—although not within the words—it shall, by an equitable construction, be held to be within the remedy of that Act. *Per* Pennefather, C. J., in *Murphy v. Leader* 143

6. The case of *Evans v. Brown* (1 Esp. 169) questioned. *Per* Pennefather, C. J., in *Mowlds v. Power* 163

7. The authority of *Lessee Conner v. McCarthy* (Batty 643), and *Roe v. Pierce* (2 Camp. 96), questioned in *Lessee Frewen v. Ahern* 185

DECLARATION.

See PLEADING, I.

DEEDS AND CONVEYANCES.

See PLEADING, 11.

1. "Articles of agreement, executed by A. and B., whereby A. granted, bargained, sold and leased unto B., all that and those, the lands of, &c., for some time actually in the possession and tenancy of B., to have and to hold unto B., his heirs, executors, &c., from the 25th of March next ensuing, for and during the term of the following lives, and the survivors and survivor of them, or for the term of thirty-one years concurrent therewith, or for whichever of them as shall longest last or subsist; that is to say," &c., naming the lives, "at the yearly lump-rent of £40, clear, &c.; said rent to be paid by two even and equal half-yearly payments, that is to say, on every 29th of September and 25th of March next ensuing; leases to be perfected at the request of either party, with the usual clauses and covenants between landlord and tenant;" *Held*, that this instrument amounted to a present actual demise for the term of thirty-one years, and was not, so far as respected said term, a mere executory agreement. Q. B. *Jones d. Leader v. Duggan* 86

2. The legal operation of a lease for three lives or thirty-one years, is when properly expressed, a freehold lease for three

lives, with a contingent remainder of thirty-one years; the years not to be in legal existence until the determination of the lives. *Per* Burton, J., in *ibid* 91

3. The words "sterling lawful money of Great Britain" in a lease executed before the Currency Act came into operation, may import British currency, if such appears to have been the intention of the parties on the face of the deed itself, without looking beyond it. C. P. *Whelan v Annesley* 334
4. The execution of a lease three days before the Currency Act came into operation, and the reservation of the rent in two fractional sums "sterling lawful money of Great Britain," which were equivalent to the decimal sums of £10 and £120 Irish currency, were sufficient indications of the intention of the parties that the rent was to be payable in British currency. *Ibid*
6. In 1827, A. demised certain lands to B.—*habendum* for one life and twenty-one years. The lease contained a proviso that if B., his heirs, &c., should assign or sublet without consent, under the hand and seal of A., his heirs or assigns, the lease should, at the election of A., his heirs, &c., be utterly void. B., in 1829, by indenture, in consideration of a marriage between C. and E., and of the sum of £30 as a marriage portion, conveyed said lands in these words: "Hath granted, bargained, sold and confirmed, and doth grant, bargain and confirm unto C., his well-beloved son, the full one-half of said lands; the one-half of said lands to be held and enjoyed during the life of B. and M. his wife; but when it may please God to call the said B. and M., then, at their death, the whole farm to devolve to C., his heirs, &c." This indenture was executed in the interval between the two Subletting Acts, and without the consent of the lessor, but it was subsequently ratified by his heir. The heir was a minor at the time he ratified:—*Held, first*, that the deed of 1829 was valid as a *covenant to stand seized*. *Held, secondly*, that the assignment was void under the operation of the Subletting Act, unless confirmed

by landlord, his heirs, &c. *Held, thirdly*, that under the provisions of 7 G. 4, c. 29, the ratification by the heir, although a minor at the time of the ratification, was sufficient. Q. B. *Lessee of Davis v. Davis* 353

6. A. being seized of certain lands for lives renewable for ever, under a lease of 1796, conveyed all his interest in these lands to B. in consideration of a certain annuity, by a deed bearing date the 19th of August 1836; in 1839 B. died, leaving A. surviving him, having previously made his will, whereby he devised and bequeathed the lands of Glonnalougha, part of said lands, to C. and D. for a term of 500 years, to the use of B. for life, with remainders over, and appointed C. and D. executors of his will: after the death of B., C. executed a memorial of the deed of 1836, and had it registered upon 17th February 1840; in May 1840 A. conveyed these lands, amongst others, to the use of other persons in derogation of the conveyance made to B., and this deed was registered on the 14th of May 1840; *Held*, upon a conflict of priorities between these two deeds that C. was entitled, within the meaning of the Registry Acts (6 Anne c. 2, and 8 G. 1, c. 15) to register this deed, both in his character of executor to B., and also in his character as assignee of B.—*Held also*, that the Registry Acts ought to receive an equitable construction.—*Held also*, that the rule of giving an equitable construction to Acts of Parliament passed for the public benefit, in order to extend the remedy and suppress the mischief contemplated by the Act, is a well established and subsisting rule, and is not affected by *Brandling v. Barrington* (6 B. & C. 475). Q. B. *Murphy v. Leader* 139

DEFENCE.

See EJECTMENT, 15, 19.

DEMAND OF POSSESSION.

See EJECTMENT, 3, 10.

DEMISE.

See DEEDS AND CONVEYANCES, 1.
EJECTMENT, 13.

DEMOLISHING, &c.

DEMOLISHING DWELLING-HOUSE.

See CRIMINAL LAW, 9.

DEMURRER.

See PLEADING.

DIRECTORS.

See PUBLIC COMPANY.

DISCHARGE OF PRISONER.

See ARREST.

DISTRESS.

See PLEADING, 2, 3, 11.
REFLEVIN.

DIVORCE.

See EVIDENCE, 4.

DROGHEDA RAILWAY.

See PUBLIC COMPANY.

DWELLING HOUSE.

See CRIMINAL LAW, 9.

ECCLESIASTICAL COURT.

See EVIDENCE, 4.

EJECTMENT.

See JUDGMENT AS IN CASE OF
NONSUIT, 2, 3.
SERVICE, 10.

I. *Ejectment on the Title.*

1. Ejectment on the title.—A., the lessor, his title being admitted by the defendant, proved a deed of 1792, whereby his father conveyed certain lands, of which those in the ejectment formed a part, to a trustee, in trust for the lessor and B. his brother, for life, with cross remainders; B. died without issue, in 1824, and receipt of rent by him up to that time from the defendant was proved. On cross-examination of one of plaintiff's witnesses it appeared, that upon several occasions the defendant shewed to the lessor an instrument under which he alleged he held the lands, and which the lessor at all times alleged was a forgery: it also appeared, that the lessor had in Court either that instrument or some document connected with the defendant's title to the land, which he said was greatly obliterated. A notice to quit on

EJECTMENT.

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the 1st of May, or at the end of six months from that day, had been *personally* served upon the defendant, and a demand of possession made upon the 2nd of May, upon which the ejectment was brought. The Judge who tried the case directed the Jury, if they believed there was a lease or other instrument in writing evidencing the tenancy, to find for the defendant; but if they should think there was not, or that it was altered or obliterated in a material part, to find for the plaintiff: *Held*, that this direction was erroneous; there being no evidence to warrant any question being left to the Jury, as to the existence of such instrument, or as to its obliteration or alteration if it did exist. *Held also*, that the facts proved were evidence of a tenancy from year to year, and the receipt of the notice to quit by the defendant without objection, although in the alternative, was evidence of the determination of the tenancy upon the first of May, in the absence of all evidence upon the part of the defendant upon either of these points.—*Crampton, J.*, inclined to think that the plaintiff ought to be nonsuited, upon the ground that it appeared upon his own shewing, that there was a written document in existence, and not produced, evidencing the terms upon which the defendant held. Q. B. *Lessee of Hull v. M'Carthy* 157

2. For this purpose (shewing the termination of a tenancy from year to year), a notice to quit was given in evidence, which notice is in the alternative; this notice, however, goes further than the usual form of similar notices to quit, which require that the tenant should give up possession at the end of six months from the gale day next after the service thereof, or at the end of the then current year of the tenancy; for this notice requires the tenant to give up possession upon a particular day, and then goes on and says what amounts to this—"If you shew that a different day was the day of the commencement of the tenancy, then you are to quit six months after the day mentioned in the notice." A demand of possession is then made on the 2nd of May, and both parties appear to consider

- the 1st of May as the day on which the lessor of the plaintiff had a right to enter, and there is no allegation that that was not the day; and in the absence of all evidence on the part of the defendant, I apprehend this was evidence to go to the Jury, that the tenancy commenced upon the 1st of May; and moreover, this evidence goes to prove that the contract between the parties was a tenancy from year to year, to be determined by a notice to quit. *Per Pennefather, C.J., in ibid.* 159
3. In an ejectment on the title, the lessor of the plaintiff gave in evidence a lease of certain ground, bearing date the 4th of May 1825, containing a clause of forfeiture in case same was not built on within four years, and proved the forfeiture. The declaration in ejectment contained two demises, one upon the 5th of May 1829, and the other upon the 1st of January 1841. Upon the trial, it was objected by counsel for the defendant, that in consequence of the lapse of twelve years, a notice to quit or a demand of possession was necessary, to entitle the lessor to maintain his action:—*Held*, that the lessor of the plaintiff was not entitled to bring his ejectment, without at least a demand of possession.—*Q.B. Lessee of Johnson v. Russell* 170
4. Where an ejectment was brought by the landlord, founded on a notice to quit, signed by his agent and receiver; *Held*, that the subsequent bringing of the ejectment was not, in itself, a sufficient proof or recognition of the agent's authority to serve the notice to quit. *L. E. Lessee of Frewen v. Ahern* 181
5. A mere receiver of rents has, as such, no authority to serve a notice to quit. *Ibid*
6. Where a notice to quit is given by a person who is described therein as acting under a power of attorney from another; *Semble*—That on the trial of an ejectment brought upon such notice to quit, the power of attorney must be produced and proved. *Ibid*
7. A tenant is precluded from disputing his own statement with respect to the commencement of his tenancy. *Ibid*

8. Where it appeared that A., who lived in illicit intercourse with B., was put into possession of part of the estate of the latter, in 1798; that B. died in 1829, and C., his illegitimate son by A., succeeded to B.'s estates under his will; that A. still continued to hold the premises rent free until January 1840, when she gave up the possession of the lands to C.'s steward, by twig and sod, and left the premises; but her daughter-in-law and her husband, who were residing in the house with her for a number of years, still continued in possession of the premises; C. having brought an ejectment on the title; *Held*, that he was barred by the operation of the 3 & 4 W. 4, c. 27 (Statute of Limitations), and could not maintain his ejectment. *Q. B. Lessee of De Montmorency v. Walsh* 254
9. It is not necessary that possession to confer title, under that statute, should be an adverse possession. *Per Burton, J. in ibid.* 257
10. Where a defendant is put into possession by a brother-in-law of the lessor of the plaintiff, who lived in the same house with her, and tilled the lands; and the lessor of the plaintiff afterwards stated to the defendant, that "as the lands were to be canted, she was glad that he had got them, sooner than any other person:" *Held*, that the ejectment could not be maintained without a previous demand of possession. *C. P. Lessee of Cashin v. Coady* 298
11. Where a defendant in an ejectment on the title, has judgment against him for non-appearance to confess lease, entry and ouster, the Court will not grant a new trial on any terms, unless it clearly appears, that the defendant has a just and legal defence to the action. *C. P. Lessee of McDonald v. Lawton* 303
12. The Court will not suspend the execution of the *habere*, in order to give a party the opportunity of filing a bill in a Court of Equity to sustain his rights. *Ibid*
13. In an ejectment on the title, the demise in the declaration stated, that fifteen persons had *jointly and severally*

EJECTMENT.

demised, &c., and at the trial it appeared that the legal title to the premises in question was vested in one only of those persons: *Held*, that this demise was bad, not being consistent with the title proved; and that the plaintiff should be nonsuited. Q. B. *Lessee M'Auley v. Molloy* 360

II.—Practice in Ejectment.

14. A party will not be permitted to take defence, whose interest has been acquired subsequently to the service of the ejectment. L. E. *Lessee M'Kiernan v. Shenkin* 180
15. When several parties had taken defence in an ejectment, the Court compelled them to consolidate their defences, and each of them to furnish the plaintiff with a bill of particulars of the lands for which he had severally taken defence. C. P. *Lessee Boyle v. Ejector* 220
16. In ejectment on the title, a defendant will not be compelled to give security for costs, unless fraud or collusion is clearly shewn. Q. B. *Lessee O'Brien v. Dwyer* 380
17. A tenant was served with an ejectment on the title, but died before he had taken defence, and judgment was marked. The Court would not set aside the judgment, and allow the widow of the deceased tenant to take defence, before she had taken out administration. C. P. *Lessee Hastings v. Ejector* 404
18. Has the Court power to order an amendment of a declaration in ejectment for non-payment of rent, after the service? *Quærs.* C. P. *Lessee Lewin v. Jennings* 418
19. A defendant in ejectment for non-payment of rent, may be required to confine his defence to the lands in his actual possession. C. P. *Lessee Horsfall v. Jennings* 218

ELECTIVE FRANCHISE.

See REGISTRY OF ELECTORS.

ENGLAND.

See JUDGMENT, 21.

EVIDENCE.

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EQUITABLE DEFENCE.

See EJECTMENT, 12.

EQUITY COSTS.

See COSTS, 8.

ESTATE FOR LIFE AND IN TAIL.

See JUDGMENT, 1.

WILL.

ERROR.

See COSTS, 11.

EVIDENCE.

See EJECTMENT, 1

STAMPS.

TRESPASS.

WITNESS.

1. I take the rule of law to be, that where a party comes into Court, and it appears upon his own shewing that there is a written instrument between the parties, evidencing the contract between them, if he does not produce it, he must be nonsuited. *Per* Crampton, J. in *Lessee Hull v. M'Carthy* 161
2. When a notice to quit is given by a person who is described therein as acting under a power of attorney from another; *Semble*—that on the trial of an ejectment brought upon such notice to quit, the power of attorney must be produced and proved. L. E. *Lessee of Frewen v. Ahern* 181
3. In an action of *quare impedit* for the recovery of the living of Camus, in which the Bishop was the defendant, the principal issues being as to the *seizin* of King James the First, and *seizin* and possession of the plaintiffs, the plaintiffs gave in evidence a recovery of the said living in *quare impedit* by the Earl of Ulster against the Bishop in 1299, and vested the same by proof of pedigree in King James the First. They then gave in evidence a Royal Commission and Inquisition of the 30th of August 1609, finding that all the advowsons in the county of Coleraine, of which Camus was one, did of right belong to the King in right of the Crown. They next gave in evidence articles of agreement, dated in the following January, between the Crown and the Mayor and Commonalty

of London, whereby it was stipulated, that all the said advowsons in the county of Coleraine should be vested in the city of London; and a patent by the King, in March 1613, incorporating the Irish Society (the plaintiffs), and granting to them, among others, the advowson of the church of Camus by name. They also gave in evidence a presentation by the Crown, on lapse, in 1619; and read entries from the First Fruits books, as secondary evidence of subsequent *admissions* of Clerks on presentations in 1634 and 1672. To meet this case, the defendants gave in evidence a surrender of the 1st of August, 1610, by G. M., Bishop of Derry, of all the possessions of the See of Derry to the Crown. It was not confirmed by the Dean and Chapter, nor enrolled in Ireland. Also a patent of the 3rd of August 1610, not enrolled in Ireland, by which the King (*James the First*) granted certain lands to the Bishop, and in which, after reciting that the advowsons in the county of Coleraine were the ancient possessions of the See of Derry, it was stated that a certain agreement had been entered into between the Bishop and the Society respecting them. Also the King's letters nominating the two subsequent Bishops of Derry, bearing date respectively the 11th of August 1610, and 21st of December 1611, reciting and enjoining the aforesaid agreement between the Crown and the Society. *Held*—That, independently of distinct grounds of objection to either documents, the said surrender and patent were respectively legally admissible in evidence, on the part of the defendant, for the specified purpose of shewing an admission, on the part of *James the First*, that the advowson of the said church of Camus anciently belonged and appertained to the Bishoprick of Derry—being made so by the evidence given on the part of the plaintiffs, especially that of the Commission and Inquisition. *Held*—that the two King's letters were admissible in evidence, on the same grounds.—*Held*, that the said patent, being plainly founded on the surrender, an acceptance of the surrender by the King might reasonably be presumed.—*Held*, that the 35 G. 3, c. 39, cured the objection of the non-

enrolment of the patent in Ireland.—*Held*, that, even if the surrender were void, the patent was validated against the Crown by the 10 Car. 1, sess. 3, c. 5. *Held*, that the said patent was not void on the ground of the King having been deceived in his grant.—*Held*, that collations by the Bishop's predecessors were admissible as evidence for him on the issues.—*Held*, that the First Fruits books, the Primates' Triennial Visitation books, and the Bishops' returns to the First Fruits writs, were respectively admissible, on the parts of the defendants, as secondary evidence of lost collations by the Bishops. *Semble*—Continued possession by repeated collations may be evidence of original title. *Ex. Ch. The Irish Society v. The Bishop of Derry* 193

4. In an action for recovery of necessities supplied by the plaintiff to the defendant's wife during her separation from her husband, which was alleged to have been caused by the cruelty of the husband, or by his causeless desertion and abandonment of her; *Held*, that a sentence of an Ecclesiastical Court, in a suit by the wife for a divorce and for alimony, grounded upon the husband's alleged cruelty, and to which the husband set up as a defence the wife's adultery, dismissing the suit, was admissible in evidence.—(Perrin, J., *dissentiente*.) *Q. B. Day v. Spread* 247
5. Such a suit is not *res inter alios acta*. *Ibid*
6. A father is not under any legal obligation to provide for the support of his child; and to make him liable for necessities supplied for the maintenance of the child, there must be a contract, express or implied; nor will the fact that the father has permitted the child to live with the mother while she lived apart from him, be any evidence that she is an agent of the father, or that she has any authority from him to contract debts for the maintenance of the child, when he disputes the legitimacy of such child. *Ibid*
7. A promise to pay the amount of a promissory note, which was made payable at a particular place in the body of the

EVIDENCE.

note after it became due, is evidence of the debt under the money counts, and dispenses with the omission of a special count in the declaration averring presentment in the particular place, and with proof of such presentment. Q. B. *Carnegie v. Kirby* 392

EXCEPTIONS, BILL OF.

By the operation of the Rules of this Court, a party taking a bill of exceptions at a trial in the Sittings after Term, is not irregular in not setting down the same for argument in the ensuing Term. C. P. *Reid v. Mitchell* 300

EXECUTION.

See ARBITRATION & AWARD, 2.

ARREST, 1, 5.

AUCTIONEER.

BANKRUPT, 6.

COSTS, IV.

JUDGMENT, VII.

MANDAMUS.

SHERIFF, 1.

TROVER.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

DEEDS, 6.

JUDGMENT, 8.

FALSE IMPRISONMENT.

See TRESPASS.

1. An action against a Public Company, in the name of their Public Officer, for having falsely, maliciously and without probable cause procured the arrest and imprisonment of the plaintiff, cannot be sustained by proof that one of the Directors, who was also general Manager of the Bank, had acted wilfully and maliciously in the proceedings which formed the subject matter of the arrest, without establishing the concurrence in, or adoption of his acts by the Company. C. P. *Reid v. Mitchell* 322
2. The 6 G. 4, c. 42, has made no change in the general law, as affecting such an action, beyond allowing the Company to be sued in the name of their Public Officer. *Ibid*

GAOLER.

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FATHER.

See PARENT AND CHILD.

FELONY.

See CASE.

In cases where there has been a felonious taking, replevin will not lie. C. P. *Doyle v. Kelly* 9

FIAT.

See ARREST.

FIERI FACIAS.

See COSTS, IV.

FILING PLEADINGS.

See PLEADING, IV.

FIRST FRUIT BOOKS, AND WRITS.

See EVIDENCE, 3.

FORBEARANCE.

See ASSUMPSIT, 1, 2.

GUARANTEE.

PLEADING, 7.

FOREIGN.

See IRELAND.

FORFEITURE.

See EJECTMENT, 3.

LANDLORD AND TENANT.

FORGERY.

See EJECTMENT, 1.

FRAUD.

See COSTS, 12.

FREEHOLD IN FUTURO.

See DEEDS AND CONVEYANCES, 1.

GAOL.

See GRAND JURY.

GAOLER.

Semble. The refusal of the Keeper of the Marshalsea, to bring forward a prisoner for the purpose of having him served with process, is a contempt of Court. C. P. *Maguire v. Gardiner* 310

GENERAL RULES.

GENERAL RULES.

See RULES AND ORDERS.

GRAND JURY.

See MEDICAL PRACTITIONER.

Where a presentment was made at a Presenting Sessions, for enlarging a gaol, under the 6 & 7 W. 4, c. 116, and was subsequently approved of by the Grand Jury at the ensuing Assizes: *Held*, that such presentment did not come within the terms of the 27th and 28th sections of the latter Act; and that if it had been approved of by the Grand Jury at the Assizes, it was not necessary that it should again be laid before the Magistrates and cess-payers at the Sessions for their approval. Q. B. In re *Presentment Grand Jury of Fermanagh* 394

GUARANTEE.

See ASSUMPSIT, 1, 2.

PLEADING, 3, 7.

The mere promise of a third person to pay the debt of another at a future time, does not *per se* import a contract of forbearance. L. E. *Hibernian Gas Company v. Parry* 453

HUSBAND AND WIFE.

See EVIDENCE, 4.

MARRIAGE.

INCUMBRANCES.

See JUDGMENT, 1.

INDICTMENT.

See CRIMINAL LAW.

INFANT AND GUARDIAN.

Where an Attorney enters an appearance and takes defence to an action brought against an infant, before a guardian had been appointed for such infant, the Court will hold him liable for the costs incurred by the opposite party in setting aside such defence. Q. B. *Lessee Walker v. Dwyer* 364

INFORMATION.

See QUO WARRANTO.

IRELAND.

INQUIRY.

See SERVICE, 17.

Where it appeared that a writ of inquiry, which was ordered to be sped before a Judge at *Nisi Prius*, was returnable upon the 27th of November, and was not executed until the 4th of December, but the Sittings at *Nisi Prius* commenced on the 26th November: *Held*, that the proceedings were regular, and that the verdict should not be disturbed upon the ground that the writ was out of return before it was executed. Q. B. *Browne v. Brady* 245

INSOLVENT.

See ARREST, 5.

BANKRUPTCY AND INSOLVENCY, 1.

INSPECTION OF DOCUMENTS.

1. The Court refused to order certain bills of exchange, &c., in the hands of the defendants, and which were produced and relied on by him at a former abortive trial, to be lodged with the Officer for inspection by the plaintiff, on an allegation that some of them were forgeries. C. P. *Daly v. Kelly* 16
2. Where a declaration in debt for an annuity deed contained two counts, the first for four years' arrears due 1st May 1840, and the second for five years' arrears of the same, due to the 1st of May 1841; the Court refused to strike out the first count as superfluous, it having been suggested that there had been an assignment of the deed, or to compel the plaintiff to furnish the defendant with a copy of the deed of assignment. C. P. *Clarke v. M'Daniel* 131

INSTALMENTS.

See JUDGMENT, 19.

IRELAND.

See STATUTE.

1. Ireland or Irish ports are not included in the words "Foreign ports or places," within the meaning of that Act. Q. B. *Boyce v. Jones* 231
2. *Semble*, the 3 G. 2, c. 36 (the Skerries Act), is binding on Ireland *Ibid*

IRREGULARITY.

IRREGULARITY.

See AFFIDAVIT, 3.

PLEADING, IV.

A party is not bound to notice an irregularity, when he has notice of the proceeding, in reference to which the irregularity is committed, unless such irregularity be apparent on the face of the proceeding. Q.B. *Mathers v. Coyle* 280

ISSUE.

See STAMPS, 2.

WILL.

JOINT STOCK COMPANY.

See FALSE IMPRISONMENT.

PLEADING, 4, 10.

PUBLIC COMPANY.

SCIRE FACIAS, 2, 3.

JUDGES.

See JURISDICTION, 1.

JUDGMENT.

See COSTS, 2.

EJECTMENT, 17.

PLEADING, 25, 26.

SCIRE FACIAS.

I. Effect of Judgment.

1. A vested remainder in fee after an estate tail in possession is bound by a judgment, although such vested remainder never came into possession of the conusor. C. P. *Executors of Martin v. McCausland* 340

II. Entry of.

2. The Court will not allow a plaintiff to mark judgment as for want of a plea, because the defendant, being a female, pleads in the masculine gender. C. P. *Berry v. McNeill* 17

3. The Court refused to allow judgment to be entered on a warrant of attorney reciting a bond collateral therewith, where in fact no bond had been executed. L. E. *Connor v. Connor* 315

4. The rule for judgment may be entered on a plea of confession, with stay of execution at any time within a year from the time when the stay of execution expired. Q.B. *Oldham v. Dowling* 468

III. Revival of.

5. One of two conusors of a joint judgment

JUDGMENT.

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being dead, a *scire facias* may issue to revive it against the surviving conusor and the heir and terretenants of the deceased conusor. C. P. *Keegan v. Deakin* 15

6. It is an inflexible rule of this Court, that an affidavit for liberty to issue a *scire facias* to revive a judgment, if the judgment be over twenty years old, must specify the particulars as to the payment or payments of interest relied on, viz.—where, when, by whom and to whom the payment or payments were made. Q. B. *Anonymous* 104

7. A *scire facias* issued to revive a judgment more than twenty years old, where it was merely sworn, that “several sums had been paid within the last thirteen years on foot of the the interest.” C. P. *Woodrooffe v. Blake* 417

8. A judgment may be revived by the personal representative of the *cestui que trust*, the personal representative of the person in whom the legal estate was vested being out of the jurisdiction. C. P. *Taaffe v. Kelly* 220

IV. Setting aside Judgment.

9. In a replevin case, the defendant's Attorney having promised the plaintiff's Counsel additional time to join in demurrer, which was afterwards withdrawn by the orders of the defendant himself, and judgment marked—the plaintiff having pleaded no plea to the merits, the judgment was set aside without any costs by either party. C. P. *Daniel v. Bingham* 136

10. Under the circumstances, the Court suspended their General Order, and allowed the cause to be set down for immediate argument. *Ibid*

11. An affidavit of merits made in support of a motion to set aside a judgment, should state positively that there is a good cause of defence. If the judgment be entered irregularly, or *malâ fide*, no affidavit of merits is necessary. Q. B. *Lenahan v. Earl of Bantry* 274

12. The Court set aside a judgment marked in an action of *sci fa.* by the defendant, for want of a replication, the plaintiff

having omitted to enter a rule to discontinue, under a mistaken impression, although the defendants had relied on the same, in an answer to a bill filed in Equity by the plaintiff, to raise the amount of the judgment. C. P. *Lynch v. Lynch* 298

13. A judgment having been entered up on a bond and warrant, the latter of which alone was executed, the Court set aside the judgment and execution, without costs. C. P. *M'Lernan v. M'Lernan* 331

V. Amendment of.

14. The Court will not on consent of the parties, allow judgment to be awarded on the roll, by increasing the sum for which it was entered by mistake, from the principal to the penalty of the bond. C. P. *Cromie v. Browne* 219
15. The Court refused to amend the record of a judgment obtained upon a *scire facias* sued out in Hilary Term 1841, and to which the defendant pleaded *nul tiel record*, which plea was overruled in Trinity Term 1841; the amendment sought being to have the memorial of the assignment of the judgment set out. Q. B. *Fulton v. Creagh* 275

VI. Satisfaction of.

16. Satisfaction will not be allowed to be entered on a judgment obtained at the suit of two conusees, on the allegation that the full amount had been paid to one of them, who consented, the other having emigrated in 1837, and not having been heard of since. C. P. *King v. King* 329
17. The Court refused to allow a judgment to be satisfied on payment to the plaintiff's Attorney of a sum compromised between him and the defendant, the plaintiff residing in New South Wales, although the Attorney held a general power of attorney to sue for and give discharges for all debts due to the plaintiff, and had been empowered by letter to issue execution on the said judgment. C. P. *Brennan v. French* 120
18. Where a judgment has been satisfied under a warrant of attorney fraudulently

or improperly obtained, and the facts upon which the warrant is impeached are clearly made out by the affidavits, the Court will, upon motion, set aside the satisfaction entered on the roll, without directing an issue or sending the case to be tried by a Jury. L. E. *Nuttall v. Nuttall* 480

VII. Execution on.

19. In the case of a judgment entered by warrant of attorney on a bond conditioned for payment of a sum of money by instalments, the Court will not allow execution to issue for any more than the instalments which have become due at the time of the application. C. P. *Rigley v. Birch* 14
20. The Court would not allow execution to be issued on a judgment collateral to secure an annuity, which was more than twenty years old, and no payment or acknowledgment, although it had been revived in the meantime, the defendant being resident in America, and having no property in this country. C. P. *Kelly v. Clarke* 403

VIII. Taking off the file.

21. Plaintiff allowed to take a warrant of attorney, on which judgment had been entered off the file, for the purpose of entering judgment thereon in *England*, upon the terms of vacating the judgment here. L. E. *Wall v. Lightburne* 177
22. A judgment upon the marriage of the conusee was assigned to the trustees of the marriage settlement, and a memorial of the assignment duly enrolled; the conusee having married a second time, the judgment was again assigned to the trustees of a second settlement. The personal representative of the surviving trustee of the first settlement having refused to assign the judgment to the surviving trustee of the second; the Court refused to allow the memorial of the first assignment to be taken off the file, in order that a memorial of the second might be enrolled. L. E. *Beresford v. Beresford* 316
23. *Semble*—That it was a case for a petition under the 1 W. 4. c. 60. *Ibid*

JUDGMENT AS IN CASE OF
NONSUIT.

1. Where a bill had been filed against a Banking Company, and a receiver appointed over all their property, with a reference to the Master to report on the suits to be prosecuted or defended by them, the Court would not allow judgment as in case of nonsuit to be entered up against them in a cause which had been at issue more than three Terms, they undertaking to go to trial on the first *Nisi Prius* day in the next Term. C. P. *Hughes v. Glenny* 5
2. Where in ejectment on the title against eleven persons, the defences of five of those persons had been consolidated, and plaintiff brought this cause to trial against those five persons, but such trial was postponed, at the instance of the defendants, to the next Assizes, and at the following Assizes plaintiff was unable to go to trial in consequence of the absence of his Counsel, and it was stated that the cases of all the defendants were similar; *Held*, that was sufficient cause against a motion for judgment as in case of nonsuit on behalf of a defendant whose case had not been brought to trial. Q. B. *Lessee of Lord Powerscourt v. Brislin* 283
3. This Court adheres to the rule laid down in *Gilman v. Connor* (1 Ir. Law Rep. 346), and requires a plaintiff in shewing cause against a rule *nisi* for judgment as in case of nonsuit, to shew "just cause" for not having gone to trial; and a peremptory undertaking or a slight excuse will not be sufficient cause in this Court against making the rule absolute. *Ibid*
4. When issue was joined in Hilary Term, the Court will allow a motion for judgment, as in case of a nonsuit, to be moved in Trinity Term. An affidavit is not necessary to sustain such a motion, and the Court will refuse it on the plaintiff giving a peremptory undertaking to go to trial—directing the costs to be costs in the cause. C. P. *Comyns v. McGrath* 412
Sed vide note *Ibid*
5. By the practice of this Court in ejectment cases, the cause is not considered

at issue until the second declaration is filed; and three Terms must, therefore, elapse from that time before judgment as in case of nonsuit can be obtained. L. E. *Lessee Dempsey v. Nolan* 490

JUDGMENT OF ECCLESIASTICAL COURT.

See EVIDENCE, 4.

JUDGMENT OF OUSTER.

See MANDAMUS.

JURISDICTION.

See COSTS, II.

1. Where the Judges differ in opinion upon cases reserved, the opinion of the majority is not conclusively binding on every Judge in all future cases. L. E. *In re Larkin* 46
2. There is an inherent jurisdiction in this Court over its own Officers, to direct the reference which the defendant applies for (to have the costs taxed for the amount of which the action was brought), upon his offering fair terms,—with this single qualification, that the bill of costs contains at least one taxable item. The rule is substantially laid down as it at present exists in *Hullock on Costs*, 504. *Per* Pennefather, C. J., in *Bastable v. Reardon* 169

JURY.

See GRAND JURY.

JUSTIFICATION.

See PLEADING, 12.

LACHES.

See IRREGULARITY.

LANDLORD AND TENANT.

See ARBITRATION AND AWARD, 1.
ASSUMPSIT, 3.
COSTS, 12, 13, 15.
EJECTMENT—*passim*.
PLEADING, 2, 5, 8, 11.
POWERS.
REPLEVIN.

Where a tenant held under a lease containing a clause of forfeiture, and omitted to perform the condition, so that the forfeiture accrued, but the tenant was

allowed to remain in possession for twelve or thirteen years, liable to all the covenants in the lease; *Held*, that, the landlord having passed by a reasonable time after the forfeiture becoming complete, the tenant thereby became, at all events, tenant at will, and that that tenancy must be determined before the bringing of an ejectment. Q.B. *Lessee of Johnson v. Russell* 173, 174

LEASE.

See DEEDS AND CONVEYANCES.
POWERS.

LIBEL.

In an action for libel, it is not necessary to set out in the declaration a document referred to in the libel, which does not contain matter material to the sense, or does not alter the meaning of the libellous paragraph. Q.B. *Walsh v. Henderson* 34

LIEN.

See COSTS, V.

LIMITATIONS, STATUTE OF.

See PLEADING, 20.

1. Where A. the owner in fee of certain lands, put B., with whom he lived in illicit intercourse, into possession of a portion thereof, and permitted her to continue in possession of same for a period of more than twenty years; *Held*, that by such permissive possession A., and the persons deriving under him, were barred by the operation of the 3 & 4 W. 4, c. 27, and could not maintain an ejectment for the recovery of these lands. Q.B. *Lessee of De Montmorency v. Walsh* 254
2. It is not at all necessary that the possession to confer title under that statute should be an adverse possession, as that statute has put an end to the doctrine of adverse possession, except in respect to cases coming within the 15th section.—*Per* Burton, J., in *ibid.* 257

LODGING MONEY IN COURT.

See SHERIFF, 1.

1. Money may be lodged in Court in satisfaction of an action of trespass for an

illegal distress, under the provisions of the 3 & 4 Vic. c. 105, s. 46. C.P. *Young v. Robinson* 13

2. As to the practice relating to the lodging of money in Court. L.E. *Malletts v. Doolan* 436

MAINTENANCE OF WIFE AND CHILD.

See EVIDENCE, 4.

MALICE.

See CASE.

MANDAMUS.

A. and B. were candidates for the office of Treasurer of the public monies of the city of D.; and A. having been elected, B. brought an information in the nature of a *quo warranto*, against him, and obtained judgment of *ouster* against him, and was subsequently admitted into said office by virtue of a writ of *mandamus*. C., a third party, then filed an information against B. for usurpation of said office, upon the ground that B.'s election was void, some of the electors who were within summons, not having been summoned to the meeting at which he was elected, and not having attended said meeting, and judgment of *ouster* was pronounced by this Court against B. upon this information. B. brought a writ of error to reverse this judgment, and C. applied to this Court for a *mandamus* to the Public Officer to hold a new election, upon the ground that there was then no rightful Treasurer in the office, the former election being void, upon the conceded facts in the case:—*Held*, that although this *mandamus* was not actual execution of the judgment of *ouster* against B., it was a proceeding consequential upon that judgment, and operating to put it into effect; and, upon that ground, that between the parties to that judgment, it would operate as a *supersedeas*; and, between third parties, it was good ground for staying proceedings; and, therefore, the cause shewn against the conditional order for the *mandamus* was allowed. Q.B. *The Queen v. The Lord Mayor of the city of Dublin* 147

MARRIAGE.

MARRIAGE.

Quere.—Can Presbyterian Ministers solemnize a marriage binding in law, where both or either of the parties are not members of the Presbyterian Church? Q. B. *Regina v. Mills and Regina v. Carroll* 495

MASTERS IN CHANCERY.

See AUCTIONEER.

MEDICAL PRACTITIONERS.

Where the Coroner of a county gave orders to two medical men, one for £4. 10s. and the other for £2. 10s., and the Treasurer of the Grand Jury paid the former, but refused to pay the latter sum, and the Grand Jury also refused to present for this latter sum, the Court would not give any direction to, or make any order upon, the Grand Jury in respect to the sum of £2. 10s. Q. B. *In re Thornhill* 162

MEMORIAL.

See ASSIGNMENT.

MERITS.

See AFFIDAVIT, 2.
NEW TRIAL, 2.

MISDIRECTION.

See CASE.

MONEY.

See LODGING MONEY IN COURT.

MOTION.

See AFFIDAVIT.

NEW TRIAL, 1, 3.

1. Notice must be given of a motion for time to plead. C. P. *Robinson v. Julian* 4
2. The notice of motion to set aside proceedings, ought to state on whose behalf the motion is made. Q. B. *Crawford v. McDonnell* 104
3. An affidavit of merits made in compliance with a notice of the opposite party, although not sworn or filed until after the day on which the motion might have been made according to the original notice, may be used on the motion. C. P. *Boileau v. Homan* 118

NEWSPAPER.

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4. The Court will allow an affidavit to be read in support of a motion in Chamber, although not filed at the time of the service of the notice, if a copy be served with the notice. Q. B. Ch. *Smith v. Blair* 397
5. A notice of motion ought always to state the grounds upon which it is to be made. L. E. *Anonymous* 434

MUNICIPAL CORPORATIONS.

See CORPORATIONS.

NATIONAL BANK.

See PLEADING, 10.

NEW TRIAL.

See LEASE.

1. The Court will not give leave to serve notice of motion for a new trial on the last of the four days, although an affidavit be made of the party being ignorant of the record being in this Court, or of the rule of the Court. C. P. *Coppinger v. O'Dell* 297
 2. Where a defendant in an ejectment has judgment against him for non appearance to confess lease, entry and ouster, the Court will not grant a new trial on any terms, unless it clearly appears that the defendant has a just and legal defence to the action. C. P. *Lessee of McDonald v. Lawton* 303
 3. A notice of motion for a new trial, which refers to the certificate of Counsel for the grounds of the motion, is informal. L. E. *Anonymous* 434
- ### NEWSPAPER PROPRIETOR.
- To render the service of process at the office of the proprietor of a newspaper, instead of personal service thereof, valid and sufficient to warrant the entry of a parliamentary appearance, such facts must be spread upon the affidavits of service as will bring the case within the provisions of the 6 & 7 W. 4, c. 76, and from which it will appear to the Court that the suit or proceeding against the defendant, is in relation to his character of newspaper proprietor. Q. B. *Coffey v. Barrett* 81

24 NISI PRIUS TRIALS.

NISI PRIUS TRIALS.

See PRACTICE, 3.

NOTICE.

See BANKRUPTCY AND INSOLVENCY, 6.

NOTICE OF MOTION.

See MOTION, 1, 2, 5.

NEW TRIAL, 1 3.

PRACTICE, 8.

NOTICE TO QUIT.

See EJECTMENT.

NUNC PRO TUNC.

See COMMISSIONER.

PARENT AND CHILD.

A father is not under any legal obligation to provide for the support of his child ; and to make him liable for necessaries supplied for the maintenance of the child, there must be a contract express or implied : nor will the fact that the father has permitted the child to live with the mother while she lived apart from him, be any evidence that she is an agent of the father, or that she has any authority from him to contract debts for the maintenance of the child, when he disputes the legitimacy of such child. Q. B. *Day v. Spread* 247

PARLIAMENTARY
APPEARANCE.

See APPEARANCE.
SERVICE, 1.

PARTICULARS.

See BILL OF PARTICULARS.

PARTICULARS OF DISTRESS.

See REPLEVIN.

PARTNERS.

See SERVICE OF PROCESS, 5, 16.

PATENT.

See EVIDENCE, 3.

PETITION.

A petition against an Attorney seeking a taxation of costs and a list of credits, should state some misconduct on the part

PLEADING.

of the Attorney in refusing the credits required, and ought to contain an undertaking on the part of the petitioner to pay the amount of the costs when ascertained. C. P. *Reddy v. Conroy* 135

PLAINTIFF.

See COSTS, 14, 18.

PLEA.

See PLEADING.

PLEA OF CONFESSION.

See JUDGMENT, 4.

PLEADING.

See CRIMINAL LAW.

EJECTMENT, 13.

SCIRE FACIAS, 1, 4, 5.

PLEADING.

1. *Form and validity of Declaration.*
 1. In an action for libel it is not necessary to set out in the declaration a document referred to in the libel, which does not contain matter material to the sense, or does not alter the meaning of the libellous paragraph. Q. B. *Walsh v. Henderson* 34
 2. In replevin, the declaration stated that the defendant, on, &c., "in the parish of St. Thomas, in the county of the city of Dublin, in a certain dwelling-house there took the goods," &c., of the plaintiff, and the defendant demurred specially upon the ground that the *locus in quo* was not sufficiently described: *Held*, that the description in the declaration was sufficient. Q. B. *Kenny v. Simpson* 42
 3. The plaintiff having distrained the goods of his tenant, the defendant (a third person) undertook to pay the amount of the rent in consideration of the discontinuance of the distress ; and the distress having been thereupon withdrawn, and the goods left in the hands of the tenant—*Held*, that the promise of the defendant was a collateral promise, and that the absence of an averment of default in the principal in one count, and of a special request in the other, in which the promise to pay was stated to have been upon request, were fatal

objections to the declaration on special demurrer. C. P. *Bull v. Collier* 107

4. The 7 G. 4, c. 46, *Eng.* (which is analogous to the Irish Banking Act, 6 G. 4, c. 42), is a public Act, and the 10th section of that statute extends to actions brought in Ireland as well as in England: and therefore, the public officer of an English Company established under that statute may, as such, bring actions in Ireland for debts due to the Company, without specially setting out the statute in the declaration. Q. B. *Wright v. Murphy* 258

5. In a declaration for use and occupation, an averment that the defendant held and occupied *at the request* and by the permission of the plaintiff; *Held*, bad on special demurrer. Q. B. *Colhoun v. Fox* 369

6. Action against A., and B. his wife, on the joint and several promissory note of B. and a former husband. It appeared at the trial that B. was possessed of separate property at the time she signed the note, and that on an application for payment of the note during her widowhood, she admitted the debt to be a fair one, and promised to pay it. The fact of her having separate property did not appear upon the declaration, which, after stating the making of the note by B. and her first husband, and the death of the latter, averred that B., whilst a widow and sole, "in consideration of the premises," promised to pay the note; *Held*, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for B.'s promise. L. E. *Ferrar v. Costello* 425

7. Declaration in assumpsit stating that the plaintiffs, at the request of A. and B., had supplied gas to H.'s hotel, to the value of £32; that A. and B. had accounted with the plaintiffs of and concerning the gas so supplied, and upon such accounting were found to be indebted to the plaintiffs in £32, to be paid on request; that the defendant was the receiver of the hotel, and of the monies and profits arising therein for the use of A. and B.; and in consideration that plaintiffs, at the request of defendant,

would forbear and give time to A. and B. for the payment of the said sum of money for the space of six months, he the defendant, by a certain note or memorandum in writing, signed by him, as the receiver of the hotel, and with the sanction of A. and B., promised the plaintiffs (*inter alia*), to pay them the £32 within the space of six months. Averment that plaintiffs forebore and gave time to A. and B. until the expiration of the six months, but that defendant did not perform his promise. Plea, that the promise of defendant was a promise to answer for the debt of other persons, viz., A. and B., and contained in the said note in writing in the declaration mentioned, and in the words and figures following:—"I hereby undertake as the receiver of H.'s hotel, and with the sanction of A. and B., that the sum of £32 due to the Hibernian Gas Light Company" (the plaintiffs) "for gas supplied to the above concern, shall be paid within six months from the date hereof; and I also undertake that the future supply of gas to the above concern shall be discharged by me as it may become due, until you have further notice."—*Held*, on demurrer, that a consideration of forbearance to sue, sufficiently appeared on the face of the instrument, to support the declaration. L. E. *Hibernian Gas Company v. Parry* 453

8. In debt for double rent under the 15 G. 2, c. 8, s. 9, *Ir.*, for not giving up possession pursuant to the tenant's notice to quit, the declaration must aver the notice to have been in writing. E. E. *Farrel v. Donnelly* 476

II. Form and validity of subsequent pleadings.

9. To a declaration in *indebitatus assumpsit*, the defendant pleaded that the promises, &c., were made jointly with one T. P. H. and the defendant; and that the plaintiff sued the said T. P. H. in *assumpsit*, for not performing the identical promises, &c., in the present declaration mentioned, and the Jury *assessed the damages of the plaintiff* on occasion of the non-performing of the said promises, &c., which were the *identical promises, &c.*, in the present declaration

mentioned, to a certain sum, which the said T. P. H. afterwards paid to the plaintiff, and the plaintiff accepted the same in *satisfaction and discharge of said damages, &c.*, which had been so assessed to him; the plaintiff replied, that he did not accept and take the said monies in *satisfaction and discharge of the said causes of action against the defendant in the present action*. To this replication the defendant demurred specially; *Held*, that the replication was bad, as not being a direct traverse of the matter alleged in the plea; but the plea being bad on general demurrer, as not being an answer to the plaintiff's declaration, the demurrer was overruled, and judgment was given for the plaintiff. *Q. B. Small v. Drummond* 92

10. A bond (after reciting that R. F. Q. had been appointed by the plaintiffs, as Directors of the National Bank, to be accountant in their bank, established at L., and that the defendant had, with other persons, agreed to enter into the obligation as his sureties) contained the following condition, that if the said R. F. Q. should from time to time, and at all times, faithfully account for, pay, and deliver up to the Court of Directors for the time being of the said Society, or to such other person or persons as such Court of Directors should from time to time appoint or depute for that purpose, and in such place of Great Britain or Ireland as the said Court should direct, all and every such sums of money as he the said R. F. Q. had been, or at any time thereafter should, while he continued in the service of the said Society exclusively, or be employed for or on account of any local bank, either as accountant, or in any other capacity whatever, either at the bank at L., or at any other established, or to be established, be entrusted with, or had already received, or should at any time thereafter receive, for or on account of the said Society, or of any local bank in connection with them, &c. The defendant pleaded performance;—*Held*, that it was not necessary for the plaintiffs in an action against the surety of the defaulting accountant to aver in the breach in their replication that the

Directors had appointed a person by whom, or a place in which, the accounts were to be taken.—*Held also*, on special demurrer, that the plaintiffs having averred that R. F. Q. was employed by the said Society, as accountant in the branch bank at M., and that he continued in the service of the said Society exclusively as such accountant from, &c., it was not necessary to aver an appointment of the said R. F. Q. to the office of accountant at M., or that he had accepted of the said office. *C. P. Stanhope v. Matthews* 125

11. In replevin of a distress for a rent-charge, the defendant, in his cognizance, set out deeds which made title to part of the lands on which it was charged, as well as to the rent-charge itself; *Held*, that it was not necessary to plead the lease and release as distinct deeds, as the conveyance might be resorted to as grants at common law.—*Held*, that it is not necessary to aver continuance of *seisin* in fee of the rent in the party distraining at the time of the distress; and that an averment at the conclusion of the cognizance "that the *locus in quo* is, and at the time when, &c., was part of the premises granted and released by the deed of 1712, and by virtue of which deed the premises therein mentioned were charged with, and made subject to, the said yearly rent, to be issuing and growing thereout; and because a certain sum at the said time when, &c., was due, &c.,"—a sufficient allegation of the lands being charged with the rent at the time of making the distress.—*Held also*, that it is not necessary to make profert of a deed making a tenant to the *præcipe*, and leading the uses of a recovery; or of any conveyance operating under the Statute of Uses. *C. P. Cooper v. Hamilton* 225
12. In an action of *tres. qua. clau. fre.*, defendant pleaded first, general issue; second, as to ejecting, expelling, &c., *actio non*, because he was lawfully possessed of the said premises: and the plaintiff having entered thereon, and unlawfully taken possession of the said premises, and without the license of the defendant, he, the defendant, expelled and amoved her therefrom; *Held*, that

this plea was bad on demurrer, because it did not shew a better title than plaintiff had; and because it purported to be a justification, yet did not shew title to warrant a justification. Q. B. *Tucker v. Kirwan* 376

III. Amendment of Pleadings.

13. A notice and consent served on the plaintiff, to allow the defendant to amend and add new avowries, on the terms of amending the plaintiff's copy, entering the rules to plead *de novo*, and paying to the plaintiff such costs (if any) as might be incurred by him by reason of such amendment: *Held*, sufficient without the additional terms of the defendant paying to the plaintiff the costs of his pleas in bar. C. P. *Whelan v. Annesley* 17
14. The Court will set aside a side-bar rule to amend a declaration, which was obtained pending a motion to set aside the same for irregularity. C. P. *Loughnane v. Irwin* 19
15. *Semble*—An order to amend a declaration, by subscribing the name of Counsel thereto, ought to be made on motion in open Court, and not by a side-bar rule. *Ibid*
16. Where a special demurrer was overruled, the defendant applied for leave to plead, but the Court refused the application, holding that that should be the subject of a distinct motion after an argument upon demurrer. Q. B. *Kenny v. Simpson* 42
17. A declaration in debt on an annuity deed contained two counts, the first for four years' arrears due May 1st 1840, and the second for five years' arrears of the same, due May 1st 1841. The Court would not strike out the first as superfluous, it having been suggested that there had been an assignment of the deed. The Court also refused to compel the plaintiff to furnish the defendant with a copy of the assignment of the annuity deed. C. P. *Clarke v. M'Daniel* 131
18. The declaration having been entitled of a Term different from that in which the defendant had appeared, the Court

granted liberty to amend on payment of costs, but required the rules to plead to be served *de novo*, the defendant having a claim for untaxed costs against the plaintiff, which when taxed, he intended to plead as set-off. C. P. *Carroll v. Farrelly* 137

19. A plaintiff will be allowed to amend a declaration without prejudice to the rules to plead, where the error sought to be amended was a mere clerical one.—Q. B. Ch. *Smith v. Blair* 397
20. The Court will give a defendant liberty to amend a plea of the Statute of Limitations before argument; and will not allow the plaintiff to open affidavits detailing the special circumstances of the case, for the purpose of shewing that the defendant had not a meritorious cause of defence. Where a party allows a special demurrer, he need not specify the amendments he seeks to make in his notice of motion. C. P. *Brennan v. Monahan* 415
21. Where the declaration is entitled of a Term different from that in which the writ was returnable, the defendant ought to give the plaintiff notice of the irregularity, before he serves him with notice to set it aside; or he should call on him in the alternative, either to amend, or that the declaration should be set aside. C. P. *Page v. Murphy* 417
22. In an ejectment for non-payment of rent, which went down for trial at the last Assizes, but became a *remamet*, by reason of a successful challenge of the array by the defendant, the Court would not allow an amendment of the declaration, by adding a demise in the name of the assignee of an insolvent lessor of the plaintiff. C. P. *Lessee Lewin v. Jennings* 418

IV.—Practice as to Pleadings.

23. Where one of several avowries cannot be amended on the file, it will be necessary to apply to the Court for liberty to file a new engrossment, and they will require a new engrossment of all the avowries to be filed. C. P. *Dancer v. Kelly* 3
24. The Court of Common Pleas will not

grant time to plead, unless notice of the motion has been given; and notice served the day before is sufficient. C. P. *Robinson v. Julian* 4

25. Although the defendant, who was a female, pleaded the general issue in the masculine gender, the Court would not allow the plaintiff to mark judgment as for want of plea, although notice had been given to amend. C. P. *Assignee of Berry v. M'Neill* 17

26. A defendant pleaded by mistake *non assumpsit* instead of *nil debet*, in an action of debt; and the plaintiff having marked judgment as for want of a plea, refused, on notice and consent, to set it aside without costs. The Court set aside the judgment, with costs, against the plaintiff. C. P. *Boileau v. Homan* 118

27. Where a party under terms to plead issuably, pleads an informal plea, upon which the opposite party cannot safely take issue, the Court will order it to be taken off the file with costs. C. P. *Graydon v. Kernan* 121

28. The defendant having pleaded a recovery in the Assistant-Barrister's Court *prout patet per recordum*, the plaintiff replied *nul tiel record*, concluding with a verification, and giving a day to the defendant to bring in the record, and afterwards set the cause down for argument; *Held*, that the plaintiff was irregular in not having given the defendant an opportunity of rejoining.— C. P. *Fitzsimon v. Lyons* 222

29. In an action against two defendants who had appeared in different Terms, and the declaration had been filed as of the Term in which, and on the day before, the last appearance had been entered; the Court set aside the proceedings for irregularity, plaintiff not having entered a rule for liberty to file the declaration as of the subsequent Term, and having filed the declaration previous to the last appearance. Q. B. *Mathers v. Coyle* 280

POOR LAW RATING.

See CORPORATION.

POWER OF ATTORNEY.

See JUDGMENT.

A letter of Attorney empowering a person to receive rents and serve notices to quit, requires two separate stamp duties; but *Semble*, that a letter or power of Attorney to receive rents and to distrain, requires but one; the power to distrain being incidental and ancillary to the power to receive the rents. L. E. *Lessee Boothe v. M'Gowan* 188

POWERS.

A lease was executed, under a power which required the execution to be in the presence of two witnesses, in the presence of one subscribing witness, and in the presence of another person who could testify to the fact, but had not previously, nor at the time, been called upon to be a witness; *Held*, not to be a due execution under the power. C. P. *Lessee of Church v. Donnell* 306

PRACTICE.

See also the respective Titles.

EJECTMENT.

PLEADING.

1. The appeal under the 3 & 4 Vic. c. 108, s. 50, against the right of a burgess to remain on the burgess-roll, being a proceeding analogous to an application for an information in the nature of a *quo warranto*, cannot be moved within the last four days of Term. Q. B. *Anonymous* 103
2. It is no irregularity to include more than one defendant in a *capias*, and declare against them separately afterwards. Q. B. *Crawford v. M'Donnell* 104
3. A trial of a building case postponed until the Sittings after Term, and a Special Jury granted, on the application of the defendant; although the motion was only made on the day before the trial, when the witnesses had been summoned, and the jury-panel struck, and though a notice to produce documents at the trial had been served on the plaintiff by the defendant. C. P. *Murray v. Gray* 119
4. The defendant having entered a rule to stay proceedings until costs of plaintiff's not proceeding to trial were paid, may

PRACTICE.

afterwards apply for a conditional order on the plaintiff to pay the said costs, without discharging the aforesaid rule. C. P. *Lessee Horsfall v. Jennings* 218

5. A defendant in ejectment for non-payment of rent, may be required to confine his defence to the lands in his actual possession. *Ibid*

6. As to the mode of proceeding against the members of a Joint Stock Banking Company, under the 6 G. 4, c. 42, s. 18, on a judgment recovered against the Public Officer. Q. B. *May v. Hodges* 245

7. A Commission issued to examine witnesses under the 3 & 4 Vic. c. 105, s. 69, for the trial of an issue out of Chancery, where it appeared that the witnesses would not be able to attend before a Jury; but the examination was directed to be taken *vivâ voce*. Q. B. *McLain v. Enery* 268

8. Where an affidavit has been filed as cause against a conditional order, but no Counsel appeared to shew cause, the Court will not, without notice to the opposite party, make the order absolute. Q. B. *Lessee Fenton v. Motherwell* 353

PRESBYTERIAN MINISTER.

See MARRIAGE.

PRESENT DEMISE.

See DEEDS AND CONVEYANCES, 1.

PRESENTMENT.

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See EVIDENCE, 3.

PRINCIPAL AND AGENT.

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PROCESS.

See SERVICE OF PROCESS.

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See ADMINISTRATION.

ASSIGNMENT, 1.

PLEADING, 11.

PROMISE.

See BILLS OF EXCHANGE.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROSECUTION.

See COSTS, 6, 8, 9.

PROVISIONAL ASSIGNEE.

See BANKRUPTCY AND INSOLVENCY, 1.

PUBLIC COMPANY.

See FALSE IMPRISONMENT.

PLEADING, 4, 10.

1. Where it appeared that A. was a subscriber for five shares in the Drogheda Railway Company, and in Feb. 1836, executed a parliamentary contract, covenanting for himself, his executors, administrators and assigns, to pay the amount of the shares he subscribed for, and afterwards, in May 1836, sold his shares and assigned his scrip to B.; and in August in that year, an Act of Parliament was passed, incorporating the subscribers into a Company; but A. continued as the registered proprietor of these shares in the books of the Company, and B. never claimed any rights as such assignee, and was never recognised as such by the Company: *Held*, that A. continued liable for the amount of calls on foot of the said five shares made after the said assignment, as the *proprietor* thereof, within the meaning of the statute. Q. B. *Dublin & Drogheda Railway Company v. Nash* 239
2. The word "assigns," as used in the statute incorporating this Company, means statutable assigns. *Ibid*
3. Where certain calls were made by Directors, who were bound by the 96th section to pay up all calls due by them before they acted in any way, and before

these calls were paid, or any thing done upon them, they were again rescinded: *Held*, that the Directors were authorised to rescind the resolution for these calls, although they had not paid them. *Ibid*

QUARE IMPEDIT.

See EVIDENCE, 3.

QUO WARRANTO.

See CORPORATION.

MANDAMUS.

On motion for an information in the nature of a *quo warranto*, the election of a Town Councillor being impeached by objections to his voters, on the ground of personation—it is no answer in shewing cause, that upon the defendant's affidavit enough of the opposite party's votes are bad, to reduce his number on the poll below that of the defendant. *Q. B. Regina v. Byrnes* 273

RECEIVER.

See EJECTMENT, 5.

POWER OF ATTORNEY.

A mere receiver has, as such, no authority to serve a notice to quit; but what has been relied on in the present case is, that there has been a sufficient recognition of the receiver's authority by the bringing of the ejectment; and undoubtedly there have been cases, both in this country and in England, which go the length of deciding, that the bringing of an ejectment by the landlord, founded on a notice to quit, served by a person professing to be an agent, is such a recognition. The case of *Lessee Connor v. M'Carthy* (reported in Batty, 643) goes a great way to establish that proposition, and so does the case of *Roe v. Pierce* (2 Camp. 96).—Those decisions are, however, encountered by the subsequent decision of the Court of Queen's Bench in England, in *Doe v. Walters* (10 B. & C. 626), in which case that Court was of opinion, that although a notice to quit given by an agent might be recognised on the part of the landlord by something subsequent to the service of it, yet that such recognition must be by something independent of, and antecedent to the bringing of the

ejectment. So far from that decision being overruled or impeached, I find it recognised by the Court of Common Pleas in England, in the more recent case of *Doe dem. Rhodes v. Robinson* (4 Scott, 396). That was the case of a notice to quit, given not by the immediate agent of the landlord, but by a person appointed by the agent to receive the rents: and the Court held, that in the absence of a recognition by the landlord of the party's authority to give the notice, the bringing of an action founded on the notice, was not in itself a recognition. I take it, then, to be now the settled law in England, that in order to establish the validity of a notice to quit given by an agent, you must shew that he had authority to give it at the time it was served; or, at all events, that his authority must be recognised by some act of the landlord intervening between the service of the notice and the bringing of the ejectment. *Per Brady, C. B., in Lessee Frewen v. Ahern* 185

RECORD.

See CERTIORARI.

EVIDENCE, 4.

PLEADING, 28.

REGISTRY OF DEEDS.

See DEEDS, 6.

REGISTRY OF ELECTORS.

1. The "solvent tenant test" is not the only test to be applied in estimating the value of the property required to confer the elective franchise under the Irish Reform Act (2 & 3 W. 4. c. 88). *L. E. In re Larkin* 46
2. The form of oath prescribed by the 10 G. 4, c. 8, is not the proper form of oath to be administered to Jurors empanelled on Registry Appeals, to try questions of value under the 2 & 3 W. 4. c. 88. The Jurors empanelled on such appeals are to be sworn to try whether the freehold or leasehold in right of which the claimant of the elective franchise seeks to register his vote under the Reform Act, is or is not of the clear yearly value (at which the claimant seeks to register),

REGISTRY.

over and above all rent and charges payable out of the same,—except only public or parliamentary taxes, county, parish, or church cesses, or rates or cesses, on any townland, or division of any parish or barony wherein the said freehold or leasehold is situated. L. E. *In re Larkin* 46

RELEASE.

See ASSUMPSIT, 2.

REMAINDER.

See WILL.

RENT.

See PLEADING, 8.
REPLEVIN.

RENT-CHARGE.

See PLEADING, 11, 17.

REPLEVIN.

See PLEADING, 2, 11.

1. When the plaintiff from whom a mare had been stolen, which was found in the possession of the defendant, who had purchased her from a party accused of having stolen her, had issued a writ of replevin returnable into this Court, and thereby obtained possession of the said mare, after informations had been sworn against the reputed felon, but before he had been tried; and it appeared that the accused party had been acquitted—the Court ordered the writ to be quashed, and the mare to be returned to the defendant. C. P. *Doyle v. Kelly* 9

2. The plaintiff in replevin being under terms to plead issuably, pleaded to all the avowries and cognizances, in the names of different parties, a plea of *riens in arrear* “from the plaintiff to the said defendant.” The Court ordered the plea to be taken off the file, with costs, but gave the plaintiff liberty to plead anew. C. P. *Graydon v. Kernan* 121

3. It is not necessary that a landlord distraining for rent should deliver the particulars of distress required by the 6 & 7 W. 4, c. 75, s. 6, unless in cases of distress for rent falling within the jurisdiction of the Civil Bill Courts. *Foster, J. dissentiente.* C. P. *Daniel v. Bingham* 285

SCIRE FACIAS

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REPLICATION.

See PLEADING, 9.

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See INQUIRY.

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- General Rule, M. T. 1841.—Paying money into Court. 14

SCIRE FACIAS.

See COSTS, 16.

JUDGMENT, III.

SERVICE, 7, 11, 15.

1. In a *scire facias* at the suit of the assignee of the personal representative of the conusee, the writ, after stating the recovery of the judgment, proceeded,—“And the said D. F. (the conusee) is since dead, and afterwards D. B. F., administrator of the said D. F. deceased, by his deed duly executed the judgment debt and damages aforesaid, according to the form of the statute in such case made and provided, to M.B., the plaintiff, transferred and assigned, as by the said memorial,” &c. :—*Held*, upon special demurrer to this writ—*first*, that it was not necessary to state in the writ the time of the death of the conusee; *secondly*,

that it was not sufficiently shewn that the assignment was executed after the death of the conusee; *thirdly*, that it sufficiently appeared that administration to the conusee was obtained before the execution of the assignment, the document therein, amounting to this, that D. B. F. *being* administrator, assigned; *fourthly*, that the same statement supplied the want of an averment that the conusee died intestate, as it imported that D. B. F. was the legal administrator of the conusee, and whether he was so to an intestate, or administrator with the will annexed, is not material; and where the administration is not granted to the plaintiff, but to the party through whom he derives, it is not necessary to make *profert* of the letters of administration, or set out the particulars thereof; *fifthly*, that it was not necessary to make *profert* of the assignment, the memorial *being* the assignment; and, *sixthly*, that it is not necessary to specify the time of the entry of the memorial upon the roll. *Q. B. Barry v. Hoare* 97

2. Where a judgment has been obtained against the Public Officer of a Joint Stock Banking Company, under the 6 G. 4, c. 42, s. 18, and it is sought to recover the amount of the judgment from any of the members of such Company, the proper mode of proceeding against them is by *scire facias*. *Q. B. May v. Hodges* 245

3. When the persons proceeded against were members of such Company when judgment was obtained, and still continued so, the order for leave to issue the *scire facias* will be absolute in the first instance. *Ibid*

4. A *scire facias* stated a judgment of 1825 for £2000, and £2. 1s. damages, recovered in the Court of the late King George the Fourth, before our Justices; *Held*, not to be a variance either in the description of the Court, or in the statement of the amount of the judgment. *C. P. Fair v. Rutledge* 405

5. A *scire facias* issued against a surviving conusor, and the heir and tertenants of the deceased conusor, and prayed execution against the former generally, and

against the lands which were of the latter, &c.; and the Sheriff at the conclusion of his return certified that, "at the time of the rendition of the within judgment, or at any time afterwards, *during the lifetime of the said A. D.*, that there are not, nor were there any heir or heirs of the said A. D., nor were there any tenants of any other lands or tenements which were of the said A. D., at the time of the rendition of the said judgment, or at any time afterwards, within my bailiwick, to whom I could make known, as by the within writ I am commanded;" *Held*, that there was no misjoinder in the said writ, and that the prayer of execution was not irregular;—*Held also*, that the Sheriff's return was bad, in having restricted the return of the tenants to those who were tenants of the lands during the life of the deceased conusor. *C. P. McNevin v. Dolphin* 406

SEARCH-WARRANT.

See CASE.

SECURITY FOR COSTS.

See COSTS, III.

SENTENCE OF ECCLESIASTICAL COURT.

See EVIDENCE, 4.

SERVICE OF PROCESS.

See COSTS, 6, 8, 9, 10.

I. On Newspaper Proprietors.

1. To render the service of process at the office of the proprietor of a newspaper, instead of personal service thereof, valid, and sufficient to warrant the entry of a parliamentary appearance, such facts must be spread upon the affidavits of service, as will bring the case within the provisions of the 6 & 7 W. 4, c. 76, and from which it will appear to the Court that the suit or proceeding against the defendant is in relation to his character of newspaper proprietor. *Q. B. Coffey v. Barrett* 81
2. A statement of service, "by leaving with a clerk of the defendant at the office of the said defendant, where the newspaper of which the said defendant is the registered proprietor is published,

- situate, &c., a true copy."—*Held*, insufficient. Q. B. *Coffey v. Barrett* 81
3. In this case the plaintiff might have applied for an order, that the service already had be deemed good service. *Ibid*
4. *Semble*—That the *Christian* and *name* of the Attorney for the plaintiff should be signed in full at the foot of the English notice attached to the *capias*. *Ibid*
- II.—*Substitution of Service*.
5. This Court will not substitute service of process upon a partner out of the jurisdiction by serving a partner within it, although the demand was sworn to be a partnership demand, and that the partnership still continued. C. P. *Oldham v. Shaw* 1
6. The Court will not deem a service of the writ sufficient, unless it is made to appear that the writ reached the hands of the defendant. C. P. *Francis v. Gore* 3
7. Conditional order granted to shew cause why service of a *scire facias* (the return of which was out at the time of application) on the law agent of the conusor residing out of the jurisdiction, should not be deemed good service—it having been sworn, that he was, and had been for some years, the law agent of the conusor. C. P. *Bruce v. Poe* 4
8. The Court will not make the said conditional order absolute, without notice of the motion served on the law agent. *Ibid*
9. *Semble*—The Court will not, in general, deem service already had, good service—the same not being the act of the Court; but will give an order to substitute service. *Ibid*
10. Service of copy of ejectment, &c., for non-payment of rent, on the lessee and under-tenants, by putting the same under their respective doors, which were closed for the purpose of preventing personal service, deemed good service, posting the premises with the ejectment and order—the lessee having made a motion in the Rolls Court to stay proceedings on the ejectment. C. P. *Lessee St. George v. Casual Ejector* 133
11. The Court granted a conditional order for substitution of service of a *scire facias* on the brother of the conusor, against whom a separate judgment had been entered for the same debt, he conusor residing in America. C. P. *Watson v. Armstrong* 219
12. Service of a writ on the Hatchman of the Sheriff's prison, will not be deemed good service on a prisoner; but service on the Governor of any of the Dublin gaols, will be deemed good. Q. B. *Anonymous* 275
13. Service of process on the keeper of the Marshalsea prison deemed good service of the defendant, who was in confinement therein, the said keeper having refused to bring him into the hatch for the purpose of having him served. C. P. *Maguire v. Gardiner* 310
14. *Semble*—The refusal of the keeper to bring forward the prisoner for the purpose of having him served, was a contempt of Court. *Ibid*
15. The Court ordered substitution of service of a *scire facias* on the land agent of the conusor who resided abroad, where the amount of the judgment was small, and the expense of attempting personal service would have been great. C. P. *Executors of Langton v. Massy* 412
16. In an action against partners, the Court refused to substitute service of a *ca. ad res.* upon one partner, for another residing out of the jurisdiction; the 3 & 4 Vic. c. 105, s. 37, restricting a plea in abatement for non-joinder of a co-defendant, to cases where the latter is resident within the jurisdiction. L. E. *Viner v. Boyd* 433
- III.—*Irregularity in Service*.
17. The defendant against whom judgment had been marked, and a writ of inquiry had been sped, having sworn that he had never been served with the process, but admitted the debt, the Court ordered him to pay the amount of the plaintiff's demand to him; and that the Officer should hand over the process-server's affidavit, in order that he might be prosecuted, reserving the question of setting

aside the proceedings, and the question of costs in the mean time. C. P. *Fahie v. Nash* 132

18. Where the process-server was prosecuted by the defendant, and convicted of perjury, the Court set aside the civil proceedings, with costs, but refused to make the plaintiff pay the costs of the prosecution. L. E. *Lewis v. Hynes* 177

See, also, *Fahie v. Nash* 304

19. The Court refused to set aside a parliamentary appearance, on the ground of non-service of the writ, the defendant not having sworn to merits, or stated how he obtained knowledge of the proceedings, or denied service of a copy of the process. C. P. *Bonsall v. Macklin* 312

SETTING ASIDE PROCEEDINGS.

See INFANT AND GUARDIAN.

JUDGMENT, IV.

• PLEADING, IV.

The defendant having prosecuted and convicted the process-server of perjury under an order of the Court, the Court set aside the parliamentary appearance and all subsequent proceedings, with costs and the costs of obtaining the order to take the affidavit off the file, but refused the costs of the motion, because the defendant by his notice sought for the costs of the proceedings in the Criminal Court. C. P. *Fahie v. Nash* 304

SHERIFF.

See ARREST. 1.

BANKRUPT, 6.

TRESPASS.

TROVER.

1. The Sheriffs levied an execution in the month of July last, when they received notice from a third party, a creditor of the defendant, not to pay over the amount of the execution levied, on an allegation that the defendant had committed an act of Bankruptcy, and that it was intended to have a Commission issued, but no further steps were taken in that respect. On the Sheriffs moving, that the time for the return of the *ferri facias* be ex-

tended, offering to lodge the amount levied in Court, the Court refused the motion, but without costs, as it did not appear that there was any collusion between the Sheriffs and the creditor. C. P. *Power v. O'Brien* 8

2. It is not necessary for the special bailiff of a Sheriff to take out a license as an auctioneer, or to employ a licensed auctioneer, to entitle him to sell by public cant or auction, in the usual way, goods taken in execution by him under a civil bill decree, he not being thereby a person carrying on the trade and business of an auctioneer, within the meaning of the 6. G. 4, c. 81. s. 26. Q. B. *Regina v. Martin* 153
3. *Quere.*—Is the 46th section of the 6, 7. W. 4, c. 75, repealed by the 1 Vic. c. 43. s. 3. *Ibid*

SHEWING CAUSE.

See PRACTICE, 8.

SKERRIES LIGHT-HOUSE.

See TOLLS.

SPECIAL JURY CASES.

See PRACTICE, 3.

STAMP.

See AFFIDAVIT, 3.

1. A letter of attorney empowering a person to receive rents and serve notices to quit, requires two separate stamp duties; but *Semble*, that a letter or power of Attorney to receive rents and to distrain, requires but one; the power to distrain being incidental and ancillary to the power to receive the rents. L. E. *Lessee Boothe v. M'Gowan* 188
2. Upon the trial of an ejectment under the order of a Court of Equity, the question to be tried being, whether an accepted proposal was for the term of 21 or 31 years:—*Held*, that the proposal might be given in evidence, although not stamped. L. E. *Lessee of Harding v. Macnamara* 190
3. In an action of special assumpsit upon the following contract, "I propose to super-

intend the execution and building of the B. Workhouse, and to devote my entire attention to it, for the sum of £2 per week. Signed, A. B." *Held*, that as it did not appear that this was a contract exceeding £20 in value, it did not require a stamp; *Held also*, that it was a continuing contract, and could not be put an end to without notice. Q. B. *Hickey v. Browne* 277

STATUTE.

See CORPORATION.

COSTS, V.

JUDGMENT AS IN CASE OF
NONSUIT.

1. The rule of giving an equitable construction to Acts of Parliament passed for the public benefit, in order to extend the remedy and suppress the mischief contemplated by the Act, is a well established and subsisting rule, and is not affected by *Brandling v. Barrington*, (6 B. & C. 475). Q. B. *Murphy v. Leader* 139
2. When an Act is passed for the public benefit, I hold that the words of the statute are to be extended in order to repress the mischief and advance the benefit; this is a rule established in very old cases of the highest authority, sanctioned by modern cases, and there is no modern case to contradict it: a caution may have been thrown out from the Bench, that there should be care in thus extending the words of the statute, not to allow an Act to be extended to a case never contemplated by the Legislature in enacting it. *Per Pennefather, C. J., in ibid* 143
3. The words "if the Court should so order," in the 3 & 4 G. 4, c. 124, s. 15, do not render it necessary that the assignee should obtain an order for the purpose of enabling him to sue, but he may institute proceedings without any such order, these words being merely affirmative of the right of the assignee to institute such suit, given *ex abundanti cautela*. Q. B. *Per Pennefather, C. J., in Mowlds v. Power* 167
4. The 7 G. 4, c. 46, *Eng.* (which is analogous to the Irish Banking Act 6 G. 4,

- c. 42), is a public Act, and the 9th section of that statute extends to actions brought in Ireland as well as in England. Q. B. *Wright v. Murphy* 258
5. As to the question whether this Act extends to Ireland, it is one passed by the United Parliament, and therefore capable of binding Ireland, and there is nothing to exclude Ireland from the operation of the 9th section; and when that is so, and where we will be extending the remedial provisions of the statute by holding that it does extend to Ireland, we are bound by reason and authority to give it that construction.—*Per Pennefather, C. J., in ibid.*
 6. Although I admit that the title of a statute cannot control the manifest enactments of it, yet it is the duty of the Court to call it in aid, when it can throw a light on an ambiguity in any of its provisions. *Per Torrens, J., in Daniel v. Bingham* 293
 7. The matters required to be done by the 38th section of the 3 & 4 Vic. c. 108, are essential, and the Act in regard to them is imperative, and not merely directory. *Perrin, J. dissentiente. Q. B. Regina v. Vereker* 382

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 5, 6, c. 76, *Eng.* Municipal Corporations 386
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 6, 7, c. 75, *Ir.* Sheriff's bailiff—Auctioneer's license 153
 6, 7, c. 75, s. 6. Particulars of Distress 108, 285
 6, 7, c. 76, s. 9, *Ir.* Service of Process—Newspaper Proprietor 81
 6, 7, c. 79, *E. & I.* Light-houses 233
 6, 7, c. 116, *Ir.* Grand Jury Presentments 394
 6, 7, c. 132, *Ir.* Dublin and Drogheda Railway 239

Victoria.

- 1, c. 43, *Ir.* Sheriff's bailiff—Auctioneer's license 153
 2, 3, c. 74, *Ir.* Unlawful Societies 21
 3, 4, c. 105, *Ir.* Arrest on Mesne Process 311, 366, 368
 3, 4, c. 105, ss. 10, 11, *Ir.* Warrants of attorney 484
 3, 4, c. 105, s. 27, *Ir.* Costs—Orders of Court, &c. 329, 420
 3, 4, c. 105, s. 37, *Ir.* Plea in Abatement 433
 3, 4, c. 105, s. 46, *Ir.* Paying money into Court 13
 3, 4, c. 105, s. 69, *Ir.* Commission to examine witnesses 268

TOLLS.

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- 3, 4, c. 108, *Ir.* Municipal Corporations 382
 3, 4, c. 108, s. 50. Municipal Corporations 103

STAY OF EXECUTION.

See JUDGMENT, 4.

STOLEN PROPERTY.

See REPLEVIN, 1.

STRIKING OUT PLEAS AND COUNTS.

See PLEADING, IV.

SUBSTITUTION OF SERVICE.

See SERVICE OF PROCESS.

SUPERSEDEAS.

See MANDAMUS.

SURRENDER.

See EVIDENCE, 3.

TAKING OFF THE FILE.

See JUDGMENT, VIII.
 PLEADING, IV.

TAXATION OF COSTS.

See COSTS, V.

TAXES.

See ASSUMPSIT, 3.

TENANT FROM YEAR TO YEAR.

See EJECTMENT, I.

TERM OF YEARS.

See DEEDS AND CONVEYANCES 1.

TIME.

The rule for judgment may be entered on a plea of confession, with stay of execution at any time within a year from the time when the stay of execution expired.
Q. B. Oldham v. Dowling 468

TOLLS.

Vessels sailing from Cork to Dublin, through St. George's Channel, are not

TOLLS.

subject to the toll given by the 3 G. 2, c. 36 (the Skerries Act), to the proprietor of the Skerries Light-house. Q.B. *Boyce v. Jones* 231

TOWN COUNCILLOR.

See QUO WARRANTO.

TRADER.

See BANKRUPT.

TREASURER OF THE CITY OF DUBLIN.

See MANDAMUS.

TRESPASS.

See COSTS, 23.

LODGING MONEY IN COURT.
PLEADING, 12.

In an action of trespass and false imprisonment against the Sheriff, who pleaded the general issue, the plaintiff's counsel stated the case to be, an abuse in the mode of executing a writ of *ca. sa.*, and gave in evidence, among other things, certain notices served by the plaintiff on the defendant, which recited, and admitted, that she had been arrested on such a writ: *Held*, that the defendant having omitted to prove the said writ, the Judge ought to have directed the Jury to find for the plaintiff. C. P. *Deering v. Palmer* 421

TRIALS.

See PRACTICE, 3.

TROVER.

See BANKRUPT.

On this section of the English Insolvent Act (7 G. 4, c. 57, s. 34), it has been distinctly decided, that trover lies against the Sheriff who, after notice of the insolvency, proceeds to sell the goods seized before the insolvency. It has been further decided, that trover lies against an execution creditor whose execution is laid on before the commencement of the insolvent's imprisonment, but under which the goods are subsequently sold. *Per* Brady, C. B., in *Hudson v. M. Allen* 451

WILL.

TRUSTS AND TRUSTEES.

See JUDGMENT, 22.

UNLAWFUL COMBINATION
AND CONFEDERACY.

See CRIMINAL LAW.

USE AND OCCUPATION.

See PLEADING, 5.

USES.

See PLEADING, 11.

VACATING JUDGMENT.

See JUDGMENT, 21.

VENUE.

1. Where the defendant is prevented by the act of God (a heavy fall of snow) from making the usual affidavit to change the venue, the affidavit in such case may be made by his Attorney. Q. B. *Scott v. Macauley* 40
2. The rule to change the venue was discharged, on the usual undertaking by the plaintiff to give material evidence, although the defendant undertook to admit such evidence on the trial. *Ibid*
3. No leave having been reserved, the costs of a party appearing to oppose the motion for changing the venue within the last four days of Term, will not be allowed, although he may have been served with notice of the motion. C. P. *Mara v. Murphy* 138

WARRANT OF ATTORNEY.

See JUDGMENT.

WILL.

1. The testator having two sons, Robert and Marcus, devised as follows, "I leave and bequeath to my said son Robert, during the term of his natural life, *all my estate, right, title and interest, of and to the lands of C., &c.; and in case my son Robert shall marry with the consent of his mother (if living), then I devise the same to any issue he may happen to have by his wife, in such manner as he shall, by deed or will, direct, limit or appoint; and for want of such appointment, to go equally among*

WILL.

them, share and share alike. But in case my said son Robert shall *die without issue*, then and in that case it is my will, that the said lands of C., &c., shall go to my son Marcus, his heirs and assigns for ever." *Held*, that Robert took an estate tail, with a vested remainder in fee to Marcus. C. P. *Executors of Martin v. M'Causland* 340

2. *Held also*, that an estate in remainder, after an estate tail in possession, was bound by a judgment, although the same never came into possession of the conusor. *Ibid*

WITNESS.

1. A commission was issued to examine witnesses under the 3 & 4 Vic. c. 106, s. 69, for the trial of an issue out of Chancery, where it appeared that the witnesses would not be able to attend before a Jury; but the examination was directed

WRIT.

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to be taken *vivâ voce*. Q. B. *M'Lain v. Enery* 268

2. The application for the expenses of a witness under the 54th General Rule, is a Chamber motion, and cannot be moved before the full Court. C. P. *Shaw v. Belcher* 332

WRIT.

See SCIRE FACIAS.
TRESPASS.

WRIT OF ERROR.

See MANDAMUS.

WRIT OF INQUIRY.

See INQUIRY.

WRIT OF SCIRE FACIAS.

See JUDGMENT, 5.
SCIRE FACIAS.



